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THE LAW

OF

INTERSTATE COMMERCE

AND ITS

FEDERAL REGULATION,

BY

FREDERICK N. JUDSON

OF THE ST. LOUIS BAR

SECOND EDITION

CHICAGO

T. H. FLOOD & CO.

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PREFACE.

The first edition of this book was published in May, 1905, and a supplement thereto in August, 1906, after the adoption of the amendments of that year to the Interstate Commerce Act. To such an extent has the law of Interstate Commerce and its federal regulation been developed and expanded during the intervening years, not only through judicial construction, but through far-reaching statutory changes, that a new edition is now required not only because much must be added, but also for the further reason that much of what was then declared to be the law must of necessity be rewritten.

It was said in the preface to the first edition that it was the purpose of the book to present in a compact form the law of interstate commerce as declared by the court since the adoption of the constitution, and also as enacted by Congress and applied by the Interstate Commerce Commission in the direct exercise of the power of federal regulation, and that the book was written under the conviction that the direct federal regulation of interstate commerce had come to stay.

It was also said that the rules declared by the Interstate Commerce Commission in what were then the eighteen years of its existence, though its powers had been in some respects curtailed by the judicial construction of the Interstate Commerce Act, were a body of administrative railroad law which was properly included in such a treatise, as every phase of the complex adjustment of railway rates had been considered by the Commission, and its rulings in this infinite variety of cases had a permanent value in the solution of the transportation problems of the future. At the present time it must be said that the powers of the Interstate Commerce Commission have been greatly enhanced, not only by legislation, but also by judicial construction. It now exercises powers, not only of investigation and administration, but also those that are essentially

judicial and legislative. It passes on and determines the reasonableness of rates and other regulations of carriers, and fixes their limitations for the future; and these administrative orders within the limits of their powers are not subject to judicial review. It is the more important, therefore, that the rulings of this body should be formulated, so far as may be, for the guidance of our vast transportation interests, both of railroads and the public.

In the preface to the first edition reference was made to the then agitation for the amendment of the Interstate Commerce Act. During the period which has elapsed from that publication the legislation of 1906 and 1910 has in effect given to the Commission all the increased powers that were then the subject of agitation.

As was said in the preface to the first edition, in view of the informality of the procedure, as well as for convenience and in the interest of brevity, the citations of the Commission's cases have been by the book and page of the reports without the names of the parties. It is also true that the reports of the Commission, while of permanent value, are not adjudications in the ordinary sense of the term, in that they deal with temporary conditions which may be transitory, and the administrative orders are effective for only a period of two years. It has been the aim to note those rulings which are of value as precedents for the determination of similar controversies.

While the book is entitled "The Law of Interstate Commerce and Its Federal Regulation," and deals in Part I with the law of interstate commerce as declared by the courts, the remaining parts of the book are taken up with the actual regulation of interstate commerce through the acts relating to transportation and with the Anti-Trust Act which, as declared by the Supreme Court, was enacted to protect interstate commerce against unlawful combinations. The enforcement of this act is so closely allied to the subject of the regulation of commercial intercourse that it seemed properly included in a treatise of this character.

The law of interstate commerce has through recent legislation of Congress a still broader scope, illustrated in such acts as the Pure Food, Meat Inspection, and National Quarantine

Acts, and the like, which are enacted in what for want of a better term may be classed as police regulation under the Interstate Commerce clause. The discussion of this legislation seemed apart from the scope planned for this work, and only incidental reference has been made thereto. On the other hand the questions relating to the concurrent powers of the State and Federal Government in interstate commerce, and the federal control of state regulation of state traffic of interstate carriers conducted with the same equipment and same employes as interstate traffic, seemed properly included in a treatise on the federal regulation of interstate commerce.

I take great pleasure in acknowledging my services to Mr. J. Edgar Smith, of the Washington, D. C., bar, now associated with the Interstate Commerce Commission, in valuable suggestions and assistance, especially in the annotation of Section 1 of the Interstate Commerce Act, also to Mr. J. Porter Henry, of the St. Louis bar, for very efficient services in revision, correcting proofs, and in the difficult and tedious work of preparing index.

St. Louis, Dec. 1911.

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THE LAW OF INTERSTATE COMMERCE.

PART I.

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CHAPTER I.

INTERSTATE COMMERCE UNDER THE FEDERAL CONSTITUTION.

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“The congress shall have power . . . to regulate commerce with foreign nations, among the several states, and with the Indian tribes.” Constitution of the United States, art. I, sec. 8, par. 3.

“To establish post offices and post roads.” Art. I, sec. 8, par. 7.

“The congress shall have power to make all laws which shall be necessary and proper for carrying into effect the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department, or any officer thereof.” Art. I, sec. 8, par. 18.

“No tax or duty shall be laid on articles exported from any state. No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of an-

other; nor shall vessels bound to or from one state be obliged to enter, clear, or pay duties in another." Art. I, sec. 9, par. 5.

"The citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states." Art. IV, sec. 2.

"This constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." Art. VI, par. 2.

"The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." Amendment X (declared ratified January 8, 1798).

"All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Article XIV, Section 1 (declared ratified July 28, 1868).

§ 1. **The commerce clause in the constitution.**—The commerce clause in the federal constitution illustrates more pointedly than any other the circumstances which forced the adoption of the constitution and the formation of the government of the Union, and its judicial history is the clearest example of the adaptation of a written constitution by construction to conditions and emergencies never contemplated by its framers. It was the necessity for national control over foreign commerce which was the immediate occasion for calling the convention of 1787, as the defect of the articles of confederation in failing to provide for the control of this commerce was universally recognized.

Under the articles of confederation adopted during the revolutionary war congress had power to regulate trade with the Indians, but the control of foreign and interstate commerce remained with the states. The compact between Virginia and Maryland relative to the navigation of the Potomac

river and the Chesapeake Bay, and the report of the commissioners thereon led the Virginia legislature to call a conference at Annapolis in 1786 to take into consideration the "trade of the United States, to examine the relative situation in the trade of the states, to consider how far a uniform system in their commercial relations may be necessary to the common interests and their permanent harmony." From the Annapolis conference came the call for the Philadelphia convention of 1787, which framed the constitution.

Commerce among the states however was in 1787 very simple, and other than that carried on in teams and wagons was carried on by navigation. There was comparatively little discussion in the debates of the convention or in the *Federalist* concerning the federal control over interstate commerce, and no consideration seems to have been given to the question of the effect of this grant of the federal power upon the police or taxing power of the states. It was regarded as essentially supplemental to the control over foreign commerce, and was granted so as to make the control over foreign commerce effective. It was said by Mr. Madison,¹ that without this supplemental provision the great and essential power of regulating foreign commerce would have been incomplete and ineffectual, and that with state control of interstate commerce, ways would be found to load the articles of import and export during the passage through their jurisdictions with duties, which would fall on the makers of the latter and the consumers of the former.

The far-reaching importance of this federal control over commerce among the states was not and could not be foreseen. It only came to be realized in the course of years, as the commercial development of the country demanded a judicial construction of the federal power in harmony with the requirements of such commerce. The basis of this construction for all time was made by the far-sighted and masterful reasoning in the broad and comprehensive opinions of Chief Justice Marshall.²

¹ *Federalist* No. 42. It was suggested in the convention though not adopted, and also in some of the state conventions as a condition of ratification, that no nav-

igation law or law regulating commerce should be passed without the consent of two-thirds of the members present in both houses.

² Justice Bradley in the opinion

The supreme court in 1895 in affirming the supremacy of the federal power in interstate commerce, said:¹

“Constitutional provisions do not change, but their operation extends to new matters, as the modes of business and the habits of life of the people vary with each succeeding generation. The law of the common carrier is the same to-day as when transportation on land was by coach and wagon, and on water by canal boat and sailing vessel, yet in its actual operation it touches and regulates transportation by modes then unknown, the railroad trains and steamships. Just so it is with the grant to the national government of power over interstate commerce. The constitution has not changed. The power is the same. But it operates to-day upon modes of interstate commerce, unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop.”

§ 2. Power of congress in foreign commerce and with the Indian tribes distinguished.—In the commerce clause, congress is empowered to regulate commerce with foreign nations among the several states and with the Indian tribes. Although the three classes of commerce are thus grouped in the same clause and in the same terms, there is a distinction which has been frequently discussed between interstate commerce on the one hand, and that with foreign nations and with the Indian tribes on the other, and this distinction is important not only in the construction of the legislation heretofore enacted by congress, but in determining the power of congress in what may be termed its unexercised power over interstate commerce.

In its control over foreign commerce, congress exercises the power of an independent sovereign dealing with other inde-

of the court in *Leloup v. Port of Mobile*, 127 U. S. 640, 32 L. Ed. 311, in 1887, said that a great number and variety of cases involving the commercial power of congress have been brought to the attention of this court during the past fifteen years, which have frequently made it necessary to re-examine the whole subject with care and the result has sometimes been that in order to give full and fair effect to the different

clauses of the constitution, the court has been constrained to refer to the fundamental principles stated and illustrated with so much clearness and force by Chief Justice Marshall and other members of the court in former times, and to modify to some degree certain dicta and decisions which have occasionally been made in the intervening period.

¹ *In re Debs* (1894), 158 U. S. 564, c. p. 591, 39 L. Ed. 1092.

pendent sovereign powers, and there is no implied or reserved power in the states in relation to such commerce. Congress may exercise the sovereign power of placing an embargo upon foreign commerce¹ or it may exclude aliens. Commerce with the Indian tribes is also distinct from that between the states, in that congress in such regulation exercises the power of a sovereign over a dependent people or tribal communities subject to the paramount authority of the United States.² The power of controlling commercial relations with foreign nations and with the Indian tribes is therefore an essential sovereign power, which might have been inferred as an attribute of an independent sovereign nation created by the constitution without express grant of such power in the constitution.

The power to regulate commerce among the states was expressly given to congress in order to secure equality and freedom in commercial intercourse between the states as sovereign political communities, subject only to the paramount authority of the United States in national concerns. Although the three classes of commerce are thus included in the same clause and in the same terms in the enumeration of powers, they are clearly distinguished in their historic setting and constitutional import, and the laws, which are necessary and proper in regulating commercial intercourse with foreign nations and with the Indian tribes, may not be necessary and proper in regulating such commercial intercourse between the states.³

§ 3. The preference clause in the constitution. The so-called preferential clause of the constitution (article I, section 9, paragraph 5, *supra*) illustrates this differentiation of the federal control of commerce among the states from that over foreign commerce and with the Indian tribes.

As already observed, at the time of the adoption of the con-

¹ 1 Story on the Constitution, sec. 289; *United States v. Briggantine William*, Dist. of Mass., 2 Hall's Am. Law. J. 255.

² *Cherokee Nation v. Georgia*, 5 Peters, 1 (1831), 8 L. Ed. 25; *Worcester v. Georgia*, 6 Peters, 515 (1832) 8 L. Ed. 483; *United States v. Kagama*, 118 U. S. 375, 30 L. Ed.

228 (1886); *United States v. Forty-three Gallons of Whiskey*, 93 U. S. 188, 23 L. Ed. 846 (1876); *Cherokee Nation v. Kansas Ry. Co.*, 135 U. S. 641 (1890), 34 L. Ed. 295.

³ See opinion of Justice McLean in *Groves v. Slaughter*, 15 Peters, 1 c. 505, 10 L. Ed. 800-821 (1841).

stitution, commerce among the states, all of which were connected by sea and navigable waters, was conducted wholly by navigation except what was conducted by stage or wagon. The prohibition therefore of any preference of the ports of one state over those of another, or of any duties in interstate traffic, had an importance at that time as a restraint upon the powers of the general government which can hardly be appreciated at the present time. The section is devoted exclusively to defining the powers conferred upon congress, and is a distinct limitation of the powers of congress in the regulation of commerce between the states.¹

§ 4 (3). The prohibition of tax or duty on exports from a state.—The prohibition of a tax or duty upon articles of export from any state was assumed in *Almy v. California*² to apply to exports from one state to another. It has since been held that this prohibition has no application to interstate traffic, but applies to foreign exports only.³

This clause was discussed in one of the *Insular cases*,⁴ where a bare majority of the court held that a tariff upon merchandise going into Porto Rico from the United States was not a duty upon an article exported from the United States, as it was not exported to a foreign country.

Mr. Justice Brown in delivering the opinion of the court said it was not intended to intimate that congress could lay a tariff upon merchandise carried from one state to the other, while in the dissenting opinion⁵ it was insisted that this clause was intended to prevent the exercise through the taxing power of congress or its power to regulate commerce so as to discrimi-

¹ *Morgan, etc. Co. v. Bd. of Health*, 118 U. S. 455 (1886), 30 L. Ed. 237. Attorney-General Moody, in his opinion of May 25, 1905 (Vol. 11, Senate Reports, p. 1674), advised the senate committee of interstate commerce that reasonable rates determined by legislative authority would not constitute a preference between the ports of different states within the prohibition of Art. 1, Sec. 9, paragraph 5 of the Constitution, even

though they resulted in a varying charge per ton per mile to and from the ports of the different states.

² 24 Howard, 169 (1860), 16 L. Ed. 644.

³ *Woodruff v. Parham*, 8 Wallace, 123 (1868), 19 L. Ed. 382.

⁴ *Dooley v. United States*, 183 U. S. 151 (1901), 43 L. Ed. 128.

⁵ Justices Fuller, Brewer, Harlan, and Peckham.

nate between one part of the country and another, and the power to regulate interstate commerce was granted in order that trade between the states might be left free from discriminating legislation, and not to impart the power of creating antagonistic commercial relations between them.

§ 5 (4). **Federal sovereignty in interstate commerce.**—The federal authority in interstate commerce is enforced not only by the power of regulation granted to congress by the constitution, but also by the exercise of other expressly enumerated powers of congress, more or less directly relating to interstate commercial intercourse. Thus the power to establish post offices and post roads,¹ to coin money, to establish uniform systems of bankruptcy, to grant patents for discoveries, and most

¹ The Articles of Confederation gave congress the power only to establish post offices. The enlarged grant in the constitution so as to include the establishment of post roads, was the subject of extended discussion in the ante-railroad days. See Story's Commentaries on the Constitution, sections 1123, et seq. It was discussed in connection with the building of the Cumberland or National road by the United States. See *Seabright v. Stokes*, 3 How. 151, 11 L. Ed. 537 (1845). Mr. Tucker, in his Commentaries on the Constitution, Sec. 276, claims that the power to construct post roads is limited to cases where there are no post roads and it is necessary to build them for postal purposes. He says, however, that the question of power to build the roads, where not for postal purposes, has never been settled. In *Pennsylvania v. The Wheeling & Belmont Bridge Co.*, 18 How. 421, 15 L. Ed. 435 (1856), in sustaining the power of Congress to declare the Wheeling bridge a lawful struct-

ure, the court declined to enter upon the question whether Congress possessed the power to establish the bridge as a post road under the Post Road clause, saying, "For, conceding that no such power can be derived from this clause, it must be admitted that it is at least necessarily included in the power conferred to regulate commerce among the several states." It has been claimed that the power to establish post roads would authorize Congress to organize a system of national post-road corporations with incidental power to deal in transportation of persons or property within as well as among the states. See monograph of Hon. Edgar Howard Farrar (1907). Since the introduction of railroads they have been uniformly used to carry the mails, and state roads have been used to reach post offices not reached by the railroads. In the Railroad Act of 1866, *infra*, § 42, Congress referred, in the preamble to the act, to the power to establish post roads.

important of all the taxing power, are closely associated with commercial relations and activities. There is also what has been termed the "co-efficient power," the power to make all laws necessary and proper to carry into effect the foregoing powers, and all other powers vested by the constitution, in the government of the United States or in any department or officer thereof.

The broad and comprehensive construction given to this co-efficient power, in selecting measures for carrying into execution the constitutional powers of the government has made academic rather than practical the long debated distinction between the express and implied powers of congress.¹ The words "necessary and proper" are not limited to such measures as are absolutely and indispensably necessary, without which the powers granted must fail of execution, but they include all proper means which are conducive or adapted to the end to be accomplished, and which in the judgment of congress will most advantageously effect such end.²

The federal authority in interstate commerce, as in other matters, does not rest on a mere aggregation of the enumerated powers. Although the government of the United States is one of enumerated powers, and under the tenth amendment the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people, it is also true that there is a national sovereignty—a national Federal State—within the scope of the enumerated powers, and the constitution and laws of the United States are the supreme law of the land. Upon this broad principle of the sovereignty growing out of the aggregation of enumerated powers was based the power to charter a national bank,³ the power to exercise the right of eminent domain,⁴ the power to issue legal tender notes,⁵ and the power to exclude aliens.⁶ The power to issue legal tender notes, which was strongly controverted, was based upon two

¹ *McCulloch v. Maryland*, 4 367, 23 L. Ed. 449 (1875); *Stockton v. Baltimore*, 32 Fed. Rep. 9. Wheat. 316, 438, 4 L. Ed. 579 (1819).

⁵ *Legal Tender Case*, *supra*.

² *Legal Tender Cases*, 110 U. S. 421 (1884), 28 L. Ed. 204.

⁶ *Chinese Exclusion Cases*, 130 U. S. 581 (1889), 32 L. Ed. 1068,

³ *McCulloch v. Maryland*, *supra*.

149 U. S. 698 (1893), 37 L. Ed. 905.

⁴ *Kohl v. United States*, 91 U. S.

enumerated powers, that of coining money and thereby establishing a national currency, and also upon the commerce power. It was also declared to be a power inherent in sovereignty, as exercised by other sovereignties at the time of the adoption of the constitution, and not expressly withheld by the constitution from congress.

As a political sovereignty the government of the United States may by physical force, through its official agents, in the enforcement of its powers, exercise complete sovereignty over every part of American soil which belongs to it. There is a "Peace of the United States," and this Peace can be enforced by the executive¹ in the protection of the judicial officers of the United States throughout the United States and within the limits of any State. These fundamental principles were very strongly asserted in the Debs case,² where the court said that the government of the United States, in the exercise of its power over the mails and in protecting interstate commerce, had jurisdiction over every foot of soil in its territory and acted directly upon every citizen. The decision was expressly based upon the sovereign power of the United States within the limits of its enumerated powers, and on the power of the government to enforce that sovereignty through the executive or through the courts, acting directly through the citizens and not through the agencies of a state, when the federal authority is resisted.

The complexity of our federal governmental system includes this distinct sovereign power in the federal government with sovereign powers in the states. In the language of Chief Justice Marshall,³ the powers of a sovereign are divided between the government officers of the Union and those of the states. They are each sovereign with respect to the rights committed to it, and neither sovereign with respect to the rights committed to the other. The supreme court of Massachusetts⁴ said that it was a bold, wise and successful attempt to place the people under two distinct governments, each sovereign and independent within its own sphere of action, dividing the jurisdiction between them, not by territorial limits nor by the relation of

¹ In *re* Nagel, 135 U. S. 1 (1890), 34 L. Ed. 55.

² *Supra*, § 1.

³ *McCulloch v. Maryland*, *supra*.

⁴ Opinion of Justices, 14 Gray, 615.

superior or subordinate, but classifying the subjects of jurisdiction and designating those over which each had entire and independent jurisdiction.

The federal government therefore, though sovereign within the sphere of its enumerated powers, has not what has been termed inherent sovereignty, nor has it any general police powers; but with its wide scope of selection of the means for the execution of its enumerated powers the distinction is hardly a practical one in the actual working of our dual political system.

§ 6 (5). *Gibbons v. Ogden*.—The judicial construction of the commerce clause begins in 1824 with the great opinion of Chief Justice Marshall in *Gibbons v. Ogden*,¹ wherein a grant of the state of New York for the exclusive right to navigate the waters of New York with boats propelled by fire or steam was held void as repugnant to the commerce clause of the constitution, so far as the act prohibited vessels licensed by the laws of the United States for carrying on the coast trade from navigating the said waters by fire or steam.

The broad and comprehensive construction of the term "commerce" in this opinion is the basis of all subsequent decisions construing the commerce clause, and is the recognized source of authority. Commerce is more than traffic; it includes intercourse. The power to regulate is the power to prescribe the rules by which commerce is to be governed. This power like all others vested in congress is complete in itself, and may be exercised to its utmost extent, and acknowledges no limitations other than as prescribed in the constitution. The power over commerce with foreign nations and among the several states, said the court, is vested in congress as absolutely as it would be in a single government having in its constitution the same restrictions on the exercise of the power as is found in the constitution of the United States. The power comprehended navigation within the limits of every state, so far as navigation may be in any manner connected with commerce with foreign nations or among the several states, or with the Indian tribes,

¹ 9 Wheat. 1, 6 L. Ed. 23, reversing 17 Johns. 488 (1820), and 19 Wheat. 1, 6 L. Ed. 23, reversing 17 Johns. 488 (1820), and also in *Livingston v. Van Ingen*, 9 Johns. 507 (1812.)
Kent, J., in 4 Johns. Ch. 150

and therefore it passed beyond the jurisdictional line of New York and included the public waters of the state which were connected with such foreign or interstate commerce.

The most important and far-reaching declaration in the opinion was that of the supremacy of the federal power, so that in any case of conflict the act of congress was supreme, and state laws must yield thereto, though enacted in the exercise of powers which are not controverted.

§ 7 (6). **What is commerce.**—The term “commerce” is not defined in the constitution, but its meaning has been determined by the process of judicial inclusion and exclusion on the broad and comprehensive basis laid down in *Gibbons v. Ogden*. Commerce, it was there said, is not traffic alone, it is intercourse. “It described the commercial intercourse between nations, and parts of nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse.”

In the *Passenger Cases*¹ the rule declared in *Gibbons v. Ogden* was applied in holding invalid certain state statutes imposing taxes upon alien passengers. It was said that commerce included navigation and intercourse and the transportation of passengers.

In the *Pensacola Telegraph Company case*² the court said that since the case of *Gibbons v. Ogden* it had never been doubted that commercial intercourse was an element which comes within the power of regulation by congress, and that the power thus granted was not confined to the instrumentalities of commerce known or in use when the constitution was adopted, but kept pace with the progress of the country, adapting themselves to the new developments of time and circumstances. In the language of the court:

“They extend from the horse with its rider to the stage coach, from the sailing vessel to the steamboat, from the coach and steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate at all times and under all circumstances.”

¹ 7 How. 283 (1849), 12 L. Ed. 702. 24, 1866, as a prohibition of all state monopolies in interstate tele-

² 96 U. S. 1 (1877), 24 L. Ed. 708, 711. Construing act of July graph business.

In a later case it was said¹ that the commerce which congress could regulate included not only the interchange and transportation of commodities or visible and tangible things, but the carriage of persons and the transmission by telegraph of ideas, orders and intelligence.

Importation into one state from another is the indispensable element, the test of interstate commerce; and every negotiation, contract, trade and dealing between citizens of different states which contemplates and uses such importation, whether it be of goods, persons or information, is a transaction of interstate commerce.² Such commerce, therefore, includes not only communication by telephone between points in different states,³ but also communication through a correspondence school, where the intercourse and communication relates to matters of regular and continuous business and the conduct of such business, therefore, through local agencies is exempt from state control or interference.⁴

While a bridge is not a common carrier, it affords a highway

¹ *W. U. Tel. Co. v. Pendleton*, 132 U. S. 247 (1887), 39 L. Ed. 1187.

² From opinion of Sanborn, J., in *Butler Brothers Shoe Co. v. United States Rubber Co.*, 156 Fed. 1, C. C. A. 8th Cir., quoted by the Supreme Court, in *International Text Book Co. v. Pigg*, 217 U. S. 91, 54 L. Ed. 678 (1910).

³ *Richmond v. Southern Bell Tel. Co.*, 174 U. S. 761, 43 L. Ed. 1162 (1899); *Sunset Telephone & Telegraph Co. v. Ureka*, 172 Fed. 785, Cir. Ct. of Northern Dist. of Cal. (1902). In *United States v. Westman*, 182 Fed. 1017 (Ore. 1910), the Act of June 25, 1910, known as the "White Slave Traffic Act," making it a criminal offense to knowingly transport, or to procure the transportation of women for immoral purposes, was sustained as within the commerce power of Congress. The case was distinguished from *Keller v.*

United States, 218 U. S. 128, 53 L. Ed. 737, where the court held invalid the statute of 1907 which made criminal the harboring for immoral purposes alien women within three years after entrance into the United States.

The White Slave Traffic Act was also sustained by the District Court, E. D. of Texas, in April 1911, 187 Fed. 992, the court holding that the transportation of persons was commerce and that Congress, under its regulatory power, as declared in the Lottery cases, could prohibit a class of commerce in the interest of public morals. The validity of this statute is now (1911) pending before the Supreme Court.

⁴ *International Text Book Co. v. Pigg*, *supra*, reversing 76 Kan. 328. In *U. S. Fidelity & Guarantee Co. v. Commonwealth*, Ct. Apps. of Ky. 139 Ky. 27, the case of a corporation operating a scheme of

for such carriage, and a state enactment prescribing the rate of toll on an interstate bridge is an unauthorized regulation of interstate commerce.¹ Commerce among the states, therefore, embraces navigation, transportation of passengers and freight traffic and the communication of messages by telegraph² and by telephone³ and by correspondence schools.

The carrying of lottery tickets from one state to another by corporations or companies whose business it is to carry tangible property from one state to another, constitutes interstate commerce which may be properly prohibited by congress under its power of regulation.⁴

Interstate commerce, as distinguished from domestic commerce, includes traffic between points in the same state, but which in transit is carried through another state.⁵ It follows that the railroad commission of a state cannot, without violating the commerce clause, fix and enforce rates for the continuous transportation of goods between such terminal points.⁶ A tax on an interstate railroad can be apportioned according to mileage in a state (see § 21, *infra*), but when a freight rate is established it must be established as a whole. (See § 141, *infra*.)

Commerce includes navigation, and the power to regulate commerce comprehends the control, for that purpose, and to the extent necessary, of all the rivers of the United States which are accessible from a state other than those in which they lie.⁷ The right to regulate navigation carries with it the

recommending commercial credits through a list of attorneys of different states, was distinguished from the above case and held liable to a state license tax.

¹ *Covington, etc. Bridge Co. v. Kentucky*, 154 U. S. 204 (1894), 38 L. Ed. 962. As to taxation of an interstate bridge, see *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150 (1897), 41 L. Ed. 953, and *Henderson Bridge Co. v. Henderson*, 173 U. S. 592, 48 L. Ed. 823 (1899).

² *Pensacola Telegraph Co. case*, *supra*.

³ *Central Union Tel. Co. v.*

State, 118 Ind. 194, and *In re Penn. Tel. Co.*, 48 N. J. Eq. 91.

⁴ *Lottery Cases*, 188 U. S. 321 (1903), four judges dissenting, 47 L. Ed. 492.

⁵ *Hanley v. K. C. So. R. Co.*, 187 U. S. 617 (1903), 47 L. Ed. 333.

⁶ Delivery of packages from interstate trains to addresses in a city is a part of interstate commerce. *Burnett v. City of New York*, C. C. S. D. of N. Y., 189 Fed. 268 (1911). See also *Jewel Tea Co. v. Lee's Summit, W. D. of Mo. et al.*, 189 Fed. 280 (1911).

⁷ *Gilman v. Philadelphia*, 3 Wallace, 724, 18 L. Ed. 96.

right to regulate and improve navigable rivers and the ports on such rivers, and the power to close one of several channels in a navigable stream, if in the judgment of congress the navigation of the river will be thereby improved. Thus the power of congress over the Savannah river was not affected by the compact between South Carolina and Georgia in 1787, before the adoption of the constitution.¹ (As to concurrent power of state in river improvements, see chap. 2, *infra*.)

To constitute interstate commerce, it must be so in fact and not only in intention. The intention to ship manufactured goods to other states does not make a contract for the operation of a factory for their manufacture relate to interstate commerce in a constitutional sense so as to exempt it from the operation of state laws,² nor does such intention to export property from the state constitute a ground for the exemption from the power of state taxation. (See § 20, *infra*.)

§ 8 (7). What is not commerce.—While commerce is more than traffic and includes commercial intercourse and the transmission of intelligence, it does not include the contractual relations between citizens of different states, which are incidental or even in one sense are essential to interstate commercial intercourse. The distinction may be illustrated by a bill of lading and a bill of exchange. A bill of lading upon an interstate or foreign shipment represents the property shipped, and in the case of an interstate shipment is beyond the taxing power of a state,³ and in the case of a foreign shipment a tax upon a bill of lading is a tax upon exports, and therefore beyond the taxing power of either the state or federal government.⁴ On the other hand, a bill of exchange, whether drawn on an interstate shipment or a foreign shipment, is an incident of such commerce and not a part of it. It follows, therefore, that a broker dealing in foreign bills of exchange is not engaged in commerce, but in supplying the instrumentalities of commerce,

¹ South Carolina v. Georgia, 93 U. S. 4, 23 L. Ed. 782 (1876). As to the admiralty jurisdiction, see *infra*, § 13.

² Diamond Glue Co. v. United States Glue Co., E. D. of Wis. (1900), 103 Fed. Rep. 838.

³ Almy v. California, 24 How. 169, 16 L. Ed. 644 (1860); Woodruff v. Parham, 8 Wall. 123 (1870), 19 L. Ed. 382.

⁴ Fairbanks v. United States, 181 U. S. 283 (1901), 45 L. Ed. 862.

and a state tax upon money and exchange brokers is not void as a regulation of commerce.¹

The business of a *manufacturing* company, although the manufactured product is sold by the company in other states and in foreign countries, is not interstate commerce.² Commerce succeeds manufacture and is not a part of it, and the relation of the manufacturer, in such a case, to interstate and foreign commerce is incidental and indirect, and the business therefore is subject only to state control.

Trademarks, though useful and valuable aids of commerce, are not subject to congressional regulation, unless limited to their use in commerce with foreign nations and among the several states and with Indian tribes.³

§ 9 (8). *Insurance and commerce.*—An important application of this principle, that the contractual relations incidental to commerce are not included in the commerce clause, has been made in relation to the business of insurance. The business of fire and marine insurance is intimately related to interstate and foreign commerce, and is indeed an essential feature of such commerce, while life insurance involves an associated relation for the averaging of human lives, extending not only through the states of this country but foreign countries.⁴ It

¹ *Nathan v. Louisiana*, 8 How. 73 (1850), 12 L. Ed. 992. The lending of money by a citizen of one state to a citizen of another is not interstate commerce. *Nelms v. Mortgage Co.*, 92 Ala. 157. Mr. Hamilton, in his argument on the power to charter a national bank, 3 *Hamilton's Works* (Lodge), pp. 179–208, enumerates, among the subjects over which he had little doubt the national power extended, the regulation of policies of insurance and bills of exchange drawn by a merchant of one state upon a merchant of another.

² *Kidd v. Pierson*, 128 U. S. 1 (1888), 32 L. Ed. 346; *United States v. Knight Co.*, 156 U. S. 1 (1895), 39 L. Ed. 325.

³ *Trade Mark Cases*, 100 U. S. 82, 25 L. Ed. 550 (1879).

⁴ President Roosevelt in his message of December, 1904, says that the business of insurance vitally affects the great mass of the people of the United States, and is national and not local in its application, and that it involves a multitude of transactions among the people of the different states and between American countries and foreign governments. He urges congress to consider whether the power of the Bureau of Corporations, *infra*, § 59, could not constitutionally be extended to cover interstate transactions in insurance.

was held first in the case of a foreign fire insurance company which claimed exemption from state control, that a policy of insurance was not an instrument of commerce, but was a mere contract for indemnity against loss by fire, and that the fact that the parties were domiciled in different states did not make such contracts interstate transactions within the meaning of the commerce clause.¹ Later this ruling was applied to a contract of marine insurance,² and the court said, if the power to regulate interstate commerce applied to all the incidents to which commerce might give rise, and to all the contracts which might be made in the course of its transaction, the power would embrace the entire sphere of mercantile activity in any way connected with trade between the states. Finally, in 1900, the ruling was extended to the case of mutual life insurance, although here it was contended that the policies were not mere contracts of indemnity, but represented an associated relation based on the comparative certainty of the average life and the uncertainty of the individual life, thus necessitating a uniform law controlling this associated relation of parties resident in different states and countries. The court, however, refused to distinguish the business of mutual life insurance from that of fire and marine insurance.³ The business of insurance therefore in all its branches is subject to the legislation of the different states⁴ wherein the companies are located.

It was strongly contended by the dissenting judges in the lottery cases, *supra*, that lottery tickets, under the ruling in the insurance cases, were mere evidences of contractual relations, furnishing the means of enforcing contract rights, and were not instruments of commerce in any sense. It was ruled in the prevailing opinion, however, that lottery tickets are subjects of traffic, and are therefore subjects of commerce.

§ 10 (9). What are the subjects of commerce.—Commerce between the states includes only the subjects, which are properly and lawfully articles of commerce. The regulating power

¹ Paul v. Virginia, 8 Wall. 168 (1869), 19 L. Ed. 357.

Cravens, 178 U. S. 389 (1890), 44 L. Ed. 1116.

² Hooper v. California, 155 U. S. 647 (1895), 39 L. Ed. 297.

⁴ As to the exercise of their power by the states and its effect upon the business of insurance, see *infra*, § 16.

³ New York Life Ins. Co. v.

of congress does not deprive the states of their inherent police power in protecting the lives and property of their citizens, although the line is oftentimes difficult to draw, as the dissents in the supreme court show, between reasonable police regulation which only indirectly or incidentally affects interstate commerce, and legislation which invades the prerogatives of congress.

Thus the states may legislate to prevent the spread of crime, and may exclude from their limits paupers, convicts, persons likely to become a public charge, and persons afflicted with contagious diseases.¹ A state may protect the moral as well as the physical health of its people. A corpse is not the subject of commerce.² This power of the state includes the right to protect the people against fraud and deception in the sale of food products. The principle was applied by the court in sustaining a Massachusetts statute,³ which prohibited the manufacture and sale of imitation butter, oleomargarine, artificially colored so as to cause it to look like butter.

This principle does not extend to the exclusion of any commodity which is generally recognized as a legitimate article of commerce, though condemned and sought to be excluded by the legislation of a particular state. A state cannot determine for itself upon its own standards of public opinion what are and what are not lawful subjects of commerce, against the generally accepted opinion of the commercial world. This distinction was illustrated in another oleomargarine case⁴ where

¹ But as to right of excluding foreign immigrants, see *Henderson v. New York*, 92 U. S. 259 (1875), 23 L. Ed. 543; *Chy Lung v. Freeman*, 92 U. S. 275 (1875), 23 L. Ed. 550.

² In *re Wong Yung Quy*, 6 Saw. 442.

³ *Plumley v. Massachusetts*, 155 U. S. 461 (1895), 39 L. Ed. 223. The same principle was applied in *Crossman v. Lurman*, 192 U. S. 189 (1904), 48 L. Ed. 401, in sustaining a New York statute as to the importation of artificially colored

foreign coffee. Held that there was no error in excluding evidence that it was a recognized article of commerce. See also *Capitol City Dairy Co. v. Ohio*, 183 U. S. 238 (1902), 46 L. Ed. 171.

⁴ *Schollenberger v. Pennsylvania*, 171 U. S. 1 (1898), 43 L. Ed. 49. In *Collins v. New Hampshire*, 171 U. S. 31 (1898), 43 L. Ed. 60, the court held invalid, as being in necessary effect prohibitory, a statute prohibiting sale of oleomargarine as a substitute for butter unless colored pink.

the court held invalid a statute of Pennsylvania which absolutely prohibited the manufacture or sale of oleomargarine, so far as that statute prohibited the introduction of oleomargarine from another state and its sale in the original package.

The court distinguished the *Plumley* (Massachusetts) case on the ground that it was based upon the right of the state to prevent deception and fraud, and that the right of a state in relation to the administration of its internal affairs was one thing, and its right to prevent the introduction within its limits of an article of commerce was another and totally different thing. The court in its opinion referred to the fact that oleomargarine had been treated by congress as a proper subject of taxation,¹ that this was in effect an affirmative declaration by congress that it was a proper subject of commerce, and that it was established by competent testimony that it was a wholesome human food and a legitimate subject of commerce.

This conflict between local and general public opinion as to what are proper subjects of commerce was illustrated in the case of spirituous liquors² which the court held were legitimate subjects of commerce, the introduction and sale whereof in the original package could not be prohibited by the state.³ The right of the state in its control of its domestic commerce to enforce its own views of public policy in prohibiting the manufacture and sale of both liquors⁴ and oleomargarine⁵ had been sustained by the court.

Tobacco is also a legitimate article of commerce and the supreme court said that it could not take judicial notice of the fact that it was more noxious in the form of cigarettes than in

¹ Act of August 2, 1866, c. 40, 24 statutes at large, 209.

² See *infra*, § 19.

³ As to the regulation of interstate liquor traffic under Wilson Act, see *infra*, § 18.

⁴ *Mugler v. Kansas*, 123 U. S. 623, 31 L. Ed. 205 (1877); *Boston Beer Co. v. Mass.*, 97 U. S. 25; 24 L. Ed. 989 (1878).

⁵ *Powell v. Pennsylvania*, 127 U. S. 678 (1888), 32 L. Ed. 253. See also *Arbuckle v. Blackburn*, 6th

Circuit, 51 C. C. A. 122, 113 Fed. Rep. 616, 65 L. R. A. 864, where the court refused to enjoin the enforcement of a state statute prohibiting coloring, coating or polishing an article intended for food, whereby damage or inferiority is concealed. The court said this was not in conflict with the power of congress to regulate commerce, though applied to articles sold in original packages imported from other states.

other forms.¹ It was therefore subject to the same extent as intoxicating liquors to the police power of the state, that is, the state could declare how far cigarettes should be sold or prohibit their sale entirely after they had been taken from the original packages or had left the hands of the importer, providing no discrimination was used as against those imported from other states,² but could not prohibit their importation.

The lawful police power of the state also extends to the reasonable inspection of articles brought in from the other states, this right of inspection being expressly recognized by the constitution in the case of foreign importations.³ But this inspection must be reasonable, and is invalid if burdened with such conditions as would wholly prevent the introduction of the sound article from other states.⁴

§ 11 (10). Wild game and fish as subjects of commerce.— Lawful subjects of commerce must be capable of private ownership, and while this is not subject to the determination of a state in relation to recognized subjects of commerce, it is subject to the state control where the matter is not a subject of private ownership except as permitted by state law. Thus the wild game within a state at common law belongs to the sovereign, and in this country to the people in their collective capacity, and the state therefore has a right to say that it shall not become the subject of commerce. Upon this principle the supreme court sustained a Connecticut⁵ statute prohibiting the killing of certain game in the state, with the intent of transporting the same out of the state.

A state in the exercise of its police power may also prohibit the possession of game during prescribed seasons, except on giving bond against the sale, whether the game was taken within or without the state and although the game may have

¹ *Austin v. Tennessee*, 179 U. S. 343 (1900), 45 L. Ed. 224.

² As to size of the original package, see *infra*, § 17.

³ Art. 1, sec. 10, par. 2; *Patapsco Guano Co. v. North Carolina Board of Agriculture*, 171 U. S. 345 (1898), 43 L. Ed. 191. *New Mexico ex rel. v. Denver & R. G. R. R.*

Co., 203 U. S. 38, 51 L. Ed. 78 (1906), sustaining the hide inspection law of Territory of New Mexico.

⁴ See *Minnesota v. Barber*, 136 U. S. 313 (1890), 34 L. Ed. 455.

⁵ *Geer v. Connecticut*, 161 U. S. 519 (1896) 40 L. Ed. 793.

been taken in foreign countries during the open season for taking game in such countries.¹

The act of congress² prohibiting the shipment or transportation in interstate commerce of game killed in violation of the local laws, and requiring all packages containing game shipped in interstate commerce to be plainly marked, showing the name and address of the shipper and the character of the contents, and making the violation of these provisions a criminal offense, was sustained as within the lawful power of congress over interstate commerce.³

Under the same principle the state determines on what conditions the products of oyster beds and fisheries may become subjects of commerce, as each state, subject to the paramount control of navigation in the federal government, owns the beds of all tide waters and public waters in its jurisdiction.⁴

In the case cited from Massachusetts the courts held valid an act of that state prohibiting fisheries in the waters of Buzzard's Bay, except under the regulations prescribed by the act, and held that it applied to a vessel which had a license to fish under the laws of the United States. There has been no grant to congress of power over fisheries, and these remain under the exclusive control of the states. The extent of the territorial jurisdiction of the state of Massachusetts over the sea adjacent to its coast was held to be that of an independent nation, and except so far as the right of control over this territory had been granted to the United States, the control remained with the state, subject of course to the admiralty and maritime jurisdiction of the United States. Within what are generally recognized as the territorial limits of states by the law of nations, a

¹ New York ex rel. Silz v. Hesterbey, 211 U. S. 31, 53 L. Ed. 75 (1908), affirming 184 N. Y. 126.

² See Act of May 25, 1900, U. S. Compiled Statutes 1901, p. 3181, known as the Lacey Act.

³ Rupert v. United States, C. C. A. 8th Circuit, 181 Fed. 87 (1910).

⁴ McCready v. Virginia, 94 U. S. 391 (1876), 24 L. Ed. 248; Manchester v. Massachusetts, 139 U. S. 240 (1890), 35 L. Ed. 159. Com-

merce between the states of New York and New Jersey was not interfered with by a New Jersey statute, whereunder a riparian owner was forbidden to direct the waters of Passaic river beyond the state under a contract to furnish water supply for city of New York. Hudson County Water Co. v. McCarter, 209 U. S. 349, 52 L. Ed. 829 (1909), aff'g 70 N. J. Eq. 695.

state can define its boundaries on the sea and the boundaries of its counties; and by this test Massachusetts can properly include Buzzard's Bay within the limits of its counties.

§ 12 (11). Natural oil and gas as subjects of commerce.—Natural oil and gas are not subject to absolute ownership while in the confines of the earth, and from their tendency to move from one place to another have been called in some of the decisions minerals *feræ naturæ*. They become however lawful subjects of commerce when brought to the surface and secured in pipes. A statute of Indiana prohibiting the piping of natural gas from the state was held by the supreme court of that state to be an attempted regulation of interstate commerce, and violative of the natural right of dealing with the property, and therefore void. The court said that the natural gas in the earth cannot be a commercial commodity, but when brought to the surface and placed in pipes for transportation, it assumed that character as completely as coal in cars or petroleum in tanks.¹

While this position seems to be conceded in all the courts as to the commercial character of oil and gas when brought to the surface and secured in possession, it is also recognized that owing to the peculiar character of these substances the property right of the owner of the land in such mineral oil and gas while

¹ State ex rel. v. Indiana & Ohio Gas and Mining Co., 120 Ind. 575. In West v. Kansas Natural Gas Co., 220 U. S. —, 55 L. Ed. — (1911), the Supreme Court affirmed the United States circuit court of the Eastern District of Oklahoma, 172 Fed. 545, in enjoining the enforcement of an Oklahoma statute, which prohibited except for private use construction of pipe lines for the transportation of natural gas and held that the act providing that the gas should not be transported out of the state was void as to interference with Interstate Commerce. Natural gas was not a product which the state could conserve for its own people,

but it was property which by lawful right one could transport and sell as other personal property. In this case the state had granted the use of highways to domestic corporations engaged in intrastate transportation of natural gas, giving such corporations even the right to the longitudinal use of the state highways but denied to the appellees the right to pass under and over the highways. The court said that this discrimination was beyond the power of state to make. This case was therefore distinguished from the Indiana case, *infra*, and Justices Holmes, Lurton and Hughes dissenting.

confined in the earth is necessarily subject to qualifications. Thus an act of Indiana making it unlawful for the owner of a natural gas or oil well to allow or permit the flow of gas or oil from any such well to escape into the air, without being confined within the well or proper pipes, for a longer period than two days after the gas or oil shall have been struck in such well, was not a violation of the constitution of the United States nor taking of private property without compensation, nor a denial of due process of law, but was a lawful regulation by a state within its discretion of a subject which especially comes within its lawful authority.¹

The supreme court said in this case that there is a distinction between animals *feræ naturæ* and gas and oil, in that in the case of the former there was no individual proprietorship until the actual reduction of the property to possession, the property right until then being in the public. In the case of natural gas and oil no such right exists in the public; and in the case of the former every one may be prohibited from seeking to reduce to possession. In the case of natural gas and oil however the surface proprietors within the gas field have the right to reduce to possession the gas and oil beneath, and they cannot be absolutely deprived of this right without the taking of private property. The legislative power however, from the peculiar nature of the right and the objects upon which it is to be exerted, can be manifested for the purpose of protecting all the collective owners in the gas field and preventing waste.

It was urged in this case that it was necessary to waste the gas in order to force up the oil; but the court said this was a matter which addressed itself to the wisdom of the legislature and did not affect the power to make the regulation.

The right of a state to conserve its resources for its own people, as illustrated in the case of flowing rivers and game, docs

¹ Ohio Oil Co. v. Indiana, 177 U. S. 190, 44 L. Ed. 729. See also Brown v. Spillman, 155 U. S. 665, 39 L. Ed. 304; Westmoreland & Cambria Natural Gas Co. v. Dewitt, 130 Pa. St. 235; Townsend v. State, 147 Ind. 624; Indiana Consumers & T. R. Co. v. Horlass, 131

Ind. 446; Hague v. Wheeler, 157 Pa. St. 324; Jamison v. Indiana Natural Gas & Fuel Co., 128 Ind. 555, 12 L. R. A. 652; Benedict v. Construction Co., 49 N. J. Eq. 23; Manufacturer Gas Co. v. Ind. Nat. G. & F. Co., 155 Ind. 545.

not extend, whatever the local needs of a state, to natural oil and gas, when reduced to private possession through ownership of the soil and thus become the subjects of private ownership. In such case the state can adopt such reasonable methods of regulation of the production of oil and gas as are required by the peculiar nature of the property, but it cannot deprive the owner of his right to withdraw and sell the oil or gas when reduced to possession in interstate commerce, and a state statute seeking to attain these unauthorized ends is void.¹

§ 13 (12). The commerce clause and the admiralty jurisdiction.—The federal power over interstate and foreign commerce is reinforced as to the commerce on water, as distinguished from land transportation, by section 2, article III, of the constitution, extending the judicial power of the courts of the United States to all cases of admiralty and maritime jurisdiction. It is not within the scope of this work to consider the federal legislation enacted in the regulation of this admiralty and maritime jurisdiction, further than to show the progressive development of this jurisdiction, which has more than kept pace with the judicial development of the commerce clause.

It was first ruled, following the English precedents,² that the admiralty courts could not rightfully exercise jurisdiction except in cases where the service was substantially performed or to be performed upon the sea, or upon waters within the ebb and flow of the tides. The effect of this decision was to exclude from the admiralty and maritime jurisdiction the commerce upon the great lakes and navigable rivers of the United States. It was not until 1851 that the earlier decision was overruled, and it was definitely decided that the admiralty and maritime jurisdiction granted to the federal government by the constitution of the United States was not limited to tide waters, but extended to all public navigable lakes and rivers where commerce was carried on between different states or with foreign

¹ *West v. Kansas National Gas Co.*, *supra*. In this case the supreme court cited and quoted approvingly the opinion of the circuit court of appeals of the 8th circuit in *Haskell v. Cowhan*, 187 Fed. 402, decided shortly before

(April, 1911), wherein an interlocutory injunction against the enforcement of same Oklahoma statute was affirmed.

² *The Thomas Jefferson*, 10 Wheat. 428 (1825), 6 L. Ed. 358.

nations.¹ This case arose upon the great lakes, but the rule was subsequently extended to cases arising upon the navigable rivers of the United States where there was no ebb and flow of the tide.²

Later it was held that a stream lying wholly within a state and forming by its junction with Lake Michigan a continuous highway for commerce, both with other states and with foreign nations, was a navigable water of the United States.³ In this case the rule was announced, that those rivers must be regarded as public navigable rivers in law, which are navigable in fact, and that they constitute navigable waters of the United States within the meaning of the acts of congress in contradistinction between the navigable waters of the states, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or can be carried on with other states or foreign countries, in the customary modes in which such commerce is conducted by water. It is immaterial that the navigability of such a river may be interrupted by rapids and falls over which portages are required to be made.⁴

§ 14 (13). **Erie canal subject to admiralty jurisdiction.**—In a recent case the admiralty and maritime jurisdiction has been extended to the Erie canal, which lies wholly within the state of New York, on the ground that it connects navigable waters and is a great highway of commerce between ports of different states and foreign countries, and is, therefore, a navigable water of the United States within the legitimate scope of the admiralty jurisdiction of the courts of the United States. In this case it was adjudged that the enforcement of a lien *in rem* for repairs to a canal boat engaged in traffic on the Erie canal and

¹The *Genesee Chief*, 12 How. 443 (1851), 13 L. Ed. 1058.

²The *Magnolia*, 20 How. 296 (1857), 15 L. Ed. 909; *Fretz v. Bull*, 12 How. 466, 13 L. Ed. 1068 (1851).

³The *Daniel Ball*, 10 Wall. 557 (1870), 19 L. Ed. 999. In *Ex parte Eaglesfield*, 180 Fed. 558 (1910) E. D. of Wis., it was held that one trading in interstate commerce un-

der valid coasting license on vessel in the lakes was engaged in interstate commerce and was not subject to state or municipal license.

⁴The *Montello*, 20 Wall. 430 (1874), 22 L. Ed. 391; *Escanaba Co. v. Chicago*, 107 U. S. 678 (1882), 27 L. Ed. 442; *Miller v. The Mayor*, 109 U. S. 385 (1883), 27 L. Ed. 971; *In re Garnett*, 141 U. S. 1 (1891), 35 L. Ed. 631.

the Hudson river, and at a port in the state, was within the admiralty jurisdiction, and could not be enforced by any proceeding in the courts of the state of New York.¹

§ 15 (14). Jurisdiction of federal courts in admiralty cases.—The admiralty and maritime jurisdiction is conferred by the constitution upon the judicial power, and not in express terms upon the legislative power of the federal government. The supreme court however has held that the power of legislation upon the same subject must necessarily be in the national legislature, and not in the state legislatures. The federal legislative power is not confined to the boundaries or class of subjects which limit and characterize the power to regulate commerce; but in maritime matters it extends to all matters and places to which the maritime law extends. The boundaries and limits of the admiralty and maritime jurisdiction are matters of judicial cognizance, and they cannot be affected or controlled by legislation, whether state or national. The jurisdiction of the federal courts in maritime cases, therefore, is broader than that under the commerce clause, as it includes maritime cases, where the voyage or contract, if maritime in character, is made to be performed wholly within a single state.² Under the judiciary act of 1789 the jurisdiction of the courts of the United States is exclusive in all cases of admiralty and maritime jurisdiction, saving to suitors a common-law remedy, where the common law is competent to give it.³

§ 16 (15). State corporations in interstate commerce.—The right of a state corporation to engage in business in another state by locating therein, without the permission of that state,

¹ *The Robert W. Parsons*, 191 U. S. 17 (1903), 48 L. Ed. 73, Justices Brewer, Fuller, Peckham and Harlan dissented on the ground that the contract was not a maritime contract and that the admiralty jurisdiction did not extend to contracts for repairs to vessels which were incapacitated for foreign commerce and designed and used exclusively for mere local traffic within the state.

² *In re Garnett*, 141 U. S. 1, and cases cited, 35 L. Ed. 631.

³ Sec. 711, R. S. U. S. A contract to build a ship is not a maritime contract, and a lien given by a state law for materials used in such construction can be enforced against the vessel in the state court. *Iroquois Trans. Co. v. Ve-Laney*, 205 U. S. 354, 51 L. Ed. 227 (1907).

must depend upon whether the corporation is engaged in carrying on interstate commerce. In this connection the term "carrying on interstate commerce" is limited to the corporations actually engaged in carrying on interstate commerce, that is, common carriers and others who afford the facilities whereby commerce is carried on among the states or actually carry on such commerce and does not include manufacturing and trading companies making interstate shipments. Thus all public carriers, railroads, steamboats, telegraph or telephone companies, bridge and ferry companies operating in different states, are carrying on interstate commerce in this sense. The state can neither exclude corporations of this class actually engaged in interstate commerce, nor can it impose conditions upon the transaction of their business in the state, though it may tax their property employed in the state.¹

Corporations engaged in the execution of contracts for the federal government, are also protected as to such business from state interference or control.²

In one sense, all commercial business between citizens of different states is interstate commerce, and the manufacturer who ships his goods to the purchasers in another state is engaged in interstate commerce. This commerce is protected by the federal power against discriminating or interfering state legislation, and in such protection, there is no distinction between non-resident individuals and corporations. Corporations, it is true, are not citizens within the meaning of the constitution,³ providing that citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states, though they are persons within the meaning of the fourteenth amendment and are therefore entitled to due process of law and the equal protection of the laws. The right to engage in interstate commerce does not depend upon citizenship, and the capacity of the foreign corporation to carry on such business must be determined by its own charter, granted by the state of its creation, and by the law of the state in

¹ *Western Union Tel. Co. v. Co.*, 178 Fed. 721, Cir. Ct. E. D. of Kansas, 216 U. S. 1, 54 L. Ed. Penn. (1909).

² *Pullman Co. v. Kansas*, 355 (1909); *Pullman Co. v. Kansas*, 216 U. S. 56, 54 L. Ed. 378 (1909). ³ *Constitution*, art. IV., sec. 2; *Crutcher v. Kentucky*, 141 U. S. 47

⁴ *U. S. to use v. Fidelity Guar.* (1901), 35 L. Ed. 649.

which it is carrying on business. The manufacturing or trading company incorporated and doing business under the laws of one state can send its commercial travelers soliciting sales through other states, and may ship its goods to the purchasers, or factors, and such business cannot be interfered with by the states in the exercise of either their taxing or police powers. Such interstate commerce does not constitute a "doing of business" within the state.¹ But while the foreign manufacturing or trading corporation may sell its goods in the state, or solicit sales in the transaction of interstate commerce, it can-

¹ *Cooper v. Ferguson*, 113 U. S. 727 (1884), 28 L. Ed. 1137. In *Butler Brothers Shoe Co. v. U. S. Rubber Co.*, C. C. A. 8th Cir. 156 Fed. 1, in holding that a foreign corporation consigning goods to its factor business there, is engaged in interstate commerce and is not doing business in the latter state, within the meaning of the statute relative to the admission of foreign corporations, the court said that the broad statement in *Paul v. Virginia*, 8 Wall. 168, that a state may exclude a foreign corporation from business or may condition its admission to do business in the state by such terms as it may deem proper, had been qualified, and the following exceptions thereto established by the decisions of the supreme court.

(a) Every corporation empowered by state of its creation to engage in interstate commerce, may carry on that commerce in sound and recognized articles of congress in every state of the Union. Every prohibition and obstruction or burden which the other states attempt to impose upon such business is unconstitutional and void.

(b) Every corporation of every state which is in the employ of the United States has the right to exercise the necessary corporated powers and to transact the requisite business, to discharge the duties of that employment in every other state in the Union, without let or hindrance from the latter.

(c) Every corporation of every state has the absolute right to institute, maintain and defend in the federal courts and to remove to those courts its suits in any other state in the cases and on the terms prescribed by the acts of congress. This right of removal, however, by a foreign corporation doing business in the state is subject to the power of the state to provide that the license of any such company to do business in the state through the comity of the state should be revoked if the company should remove to the federal court a case which has been commenced in a state court. It is immaterial what is the motive of the state in the exercise of its lawful power. See *Security Mutual Life Ins. Co. v. Prewitt*, 202 U. S. 246, 50 L. Ed. 1013.

not establish a business office in the state for the transaction of intrastate business without the consent of the state. As a state has the right to exclude foreign corporations from local business it necessarily has involved therein the right to impose conditions upon their admission into the state to transact such business.¹

The state power of prohibiting, absolutely or conditionally, the foreign corporations, not engaged in interstate commerce in the constitutional sense from doing business in the state is illustrated by the rulings of the supreme court already referred to sustaining state statutes regulative of the insurance business. See § 9 *supra*. Thus, the provisions of state statutes prescribing terms and conditions of insurance contracts have been held to be written into the policy contracts made by the parties, over-riding the will of the parties and making contracts for them contrary to their expressed intent.² These statutes were sustained on the theory that the state had the power to determine the conditions under which the insurance business should be conducted, to the extent of writing these conditions in the policies for the parties and controlling the terms of their contracts, and in the case of foreign corporations such conditions would be enforced as conditions imposed upon their being permitted to do business in the state, and to which the companies are presumed to assent by doing business in the state under its laws.³

¹ *Waters Pierce Oil Co. v. Texas*, 177 U. S. 28 (1900), 44 L. Ed. 657; *Philadelphia Fire Ass'n v. New York*, 119 U. S. 110 (1886), 30 L. Ed. 342.

² *Orient Insurance Co. v. Daggs*, 172 U. S. 557 (1899), 43 L. Ed. 552; *Equitable Life Assurance Soc. v. Clements*, 140 U. S. 226, 35 L. Ed. 497 (1890); *New York Life Ins. Co. v. Cravens*, 178 U. S. 389 (1900), 44 L. Ed. 1116.

³ In mutual life insurance it is obvious that the writing of different state statutes into the policy contracts is necessarily destructive

of the insurance scheme, which is based upon the uncertainty of the individual life and the comparative certainty of the average life ascertained from human experience, and which therefore contemplates the union of the interests of a large number of persons resident in different states and countries and the administration of a fund for the mutual benefit under a single applicatory law. *New York Life Ins. Co. v. Statham*, 93 U. S. 21, 23 L. Ed. 789; *Bogardus v. Insurance Co.*, 101 N. Y. 329.

§ 17 (16). When transit ends; the original package in interstate commerce.—The “original package” rule, which has been the subject of extended judicial discussion both in relation to the taxing power as well as the police power of the state, was first declared in 1827, in *Brown v. Maryland*.¹ This case involved the validity of a statute of Maryland, requiring every importer of foreign merchandise to take out a license, paying therefor fifty dollars. The court admitted the difficulty of setting a time when the taxing power of the state should begin, but fixed it as beginning when the original package in which the goods had been imported was broken up or sold, and thus was first laid down the “original package” rule. While the court has adhered to this rule in respect to state taxation of foreign importations, it has not been extended to interstate commerce, so that goods brought from one state into another are subject to the taxing power of the state, whether they are in the original package or not;² that is to say, such goods which have reached their destination in the state may be taxed as property in common with the other property in the state, when the tax is levied without discrimination as between domestic and non-domestic goods.³

There is a distinction, however, between the taxing power of a state and its police power with reference to the original packages in interstate shipments. In the absence of legislation by congress, commerce between the states must be free, and the right to sell goods imported is an inseparable incident of the right to import. Congress alone can act as to the admission of goods from one state to another, and its non-action means that the commerce must be free.⁴ This freedom of trans-

¹ 12 Wheat. 419, 6 L. Ed. 678. Twenty years later Chief Justice Taney said in his opinion in the *License Cases*, 5 How. 1. c. 505, 12 L. Ed. 256, that he argued this case for the state of Maryland, but that since then matured reflection had convinced him that the rule laid down by the supreme court was a just and safe one. It was a very difficult question for the judicial mind, but he did not see how

the line could be drawn more accurately.

² *Woodruff v. Parham*, 8 Wall. 123 (1868), 19 L. Ed. 382; *Brown v. Houston*, 114 U. S. 622 (1885), 29 L. Ed. 257; *Pittsburg, etc. Coal Co. v. Bates*, 156 U. S. 577 (1895), 39 L. Ed. 538.

³ *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 48 L. Ed. 538 (1904).

⁴ *Bowman v. Railway Co.*, 125

portation and of sale extends to goods in their original packages, when imported in packages. Thus, the original package first introduced in *Brown v. Maryland*, in reference to foreign importations, becomes material in interstate commerce in limiting the police power of the state. An original package in interstate commerce means the box or case in which the goods were shipped, and not the package in which they were placed by the manufacturer when manufactured and before they were placed in the larger boxes for shipment.¹ The importation however must be made in the usual manner prevalent among honest dealers, and in a *bona fide* package usual for shipment.²

The original package rule was one of convenience, is not defined in any statute of the United States, and is of course only applicable where property is imported in packages. As to other property, such as live stock, the commercial transit ends when it is delivered to the consignee. Thus a flock of sheep driven through a state is a subject of interstate commerce and protected by the federal power against state taxation, although the sheep were permitted to graze during their journey.³ Property in commercial transit, however transported, through a state or into a state, is not subject to the taxing power of a state, and this immunity extends until the termination of the shipment by the delivery to the consignee.⁴ Goods, to be ex-

U. S. 465 (1888), 31 L. Ed. 700; *Lelsy v. Hardin*, 135 U. S. 100 (1890), 34 L. Ed. 128, overruling, the *License Cases*, 5 How. 504 (1847), 12 L. Ed. 256; *Lyng v. Michigan*, 135 U. S. 161, 34 L. Ed. 150 (1890). The distinction between the state police power and the state taxing power in relation to "original packages" imported from other states is illustrated in two Iowa cases (January, 1905), decided by the supreme court. In *Am. Exp. Co. v. Iowa*, 196 U. S. 133, 49 L. Ed. 471, the police interference with a liquor importation was denied; while in *Cook v. County of Marshall*, 196 U. S. 261, 49 L. Ed. 471, tax on a cigarette importation was sustained.

¹ *May v. New Orleans* 178 U. S. 496 (1900), 44 L. Ed. 1165, affirming 51 La. Ann. 1064, four justices dissenting; *Schollenberger v. Pennsylvania*, 171 U. S. 1 (1898), 43 L. Ed. 49.

² *Austin v. Tennessee*, 179 U. S. 343 (1900), 45 L. Ed. 224. See also *Cook v. County of Marshall*, *supra*.

³ *Kelley v. Rhoades*, 188 U. S. 1, 47 L. Ed. 359; *Diamond Match Co. v. Ontonagon*, 188 U. S. 82 (1903), 47 L. Ed. 394.

⁴ *Rhodes v. Iowa*, 170 U. S. 412 (1898), 42 L. Ed. 1088. In *Simpson Crawford Co. v. Burroughs of Atlantic Highlands*, 158 Fed. 372. C. C. N. J., goods were sold by complainants in New York City for delivery to customers in Atlan-

empt, however, must be actually in commercial transit, that is, the transit must have commenced by the delivery to the carrier for shipment.¹ It does not follow however that this immunity from the state taxing power would prevent the property from being subject of an illegal agreement of combination in violation of the anti-trust act (see *infra*, § 69). The termination of the transit means that the property is subject to taxation in common with other property; but it cannot be subjected to any discriminating regulations on account of its foreign origin.

§ 18 (17). The Wilson bill of 1890.—The judicial application of the original package rule in interstate commerce to the police power of the state and the consequent inability of the state to exclude the importation of liquors resulted in the passage by congress in 1890 of the so-called Wilson bill,²—providing that liquors transported into any state or territory should, upon arriving in such state or territory, be subject to the operation and effect of its laws enacted in the exercise of its police powers to the same extent and in the same manner as though such liquors had been there produced, and should not be exempt therefrom by reason of being introduced in the original packages or otherwise.

This act made effective the state prohibition of the local traffic in imported liquors.

Its constitutionality was contested on the ground that congress could not delegate its control over interstate commerce to the states. It was sustained, however, by the supreme court.³ The court said that in surrendering their own power over interstate commerce the states did not secure absolute

tic Highlands, N. J., where they were delivered from the steamboats to complainant's wagons for delivery to the purchasers, and it was held that the entire transaction constituted interstate commerce, and that the license tax thereon was invalid.

¹ *Coe v. Errol*, 116 U. S. 517 (1886), 29 L. Ed. 715.

² Act of August, 1890, and 26

Stats. 313, c. 728. The same principle was also applied in 1900, in making effective the game laws of the states. Act of May 25, 1900, 3 Comp. Stats. U. S. p. 3181, and in Act of May 9, 1902, in making effective state laws as to "oleomargarine," "butterine" and other imitations of butter.

³ *In re Rahrer*, 140 U. S. 545 (1891), 35 L. Ed. 572.

freedom in such commerce, but only the protection from encroachment afforded by conforming its execution to congress.

The court held that liquors transported into the state and there sold after the passage of this act of August, 1890, became subject to the then existing laws of the state as to the sale of liquors; that congress did not use terms of permission for the state to act, but simply removed an impediment to the enforcement of state laws in respect to imported packages in their original condition created by the absence of a specific utterance on its part. It imparted no power to the state not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction.

§ 19. The limitations of the state control of the liquor traffic. While the Wilson Act is effective in enabling a state to control the sale of liquors imported from other states, it does not prevent the importation and consumption by the consignee. This is because the term "arrival" as used in the Wilson bill, has been construed by the supreme court to mean the completion of the shipment by delivery by the consignee in the state and not by the arrival at the station of the carrier.¹ The court said that the act was not intended to, and did not, cause the power of the state to attach to an interstate commerce shipment whilst the merchandise was in transit under such shipment and until its arrival at the point of destination and delivery there to the consignee. It is immaterial that the packages of liquor are shipped by a c. o. d. interstate shipment, and the agent of the express company agrees to hold the shipment to suit the convenience of the consignee in paying for the liquor and taking it away.² Neither can intoxicating liquors shipped c. o. d. into a state from another state be seized while in the hands of the express company on the ground that the sale to the consignee was consummated at the time of shipment so that the merchandise was at his risk.³ Nor can the agent of an express company be prosecuted for violation of a state statute for furnishing knowingly intoxicating liquor to

¹ Rhodes v. Iowa, *supra*.

² Adams Express Co. v. Kentucky, 206 U. S. 129, 51 L. Ed. 987,

reversing the Court of Appeals of Ky., 87 S. W. 1111.

³ American Express Co. v. Iowa, 196 U. S. 133, 49 L. Ed. 417 (1905).

an inebriate, from another state, the agent paying the express charges,¹ as the statute construed to cover such case was held to be an attempt to regulate interstate commerce.

The liquor law of South Carolina was held void² because it imposed conditions upon the shipment into South Carolina from other states of liquor to a consumer who had purchased it for his own use, and not for sale, as the Wilson Act, while giving to the state plenary power to regulate the sale of liquors, did not permit the state to prevent an individual from ordering liquors from outside of the state for his own consumption.

A state, in the exercise of its police powers within the meaning of the Wilson Act, may lawfully impose an inspection fee upon beer or other malted liquors shipped from other states into the State and held for consumption therein; and it was held immaterial that such an act was denominated as an "inspection law" and did not provide an adequate inspection.³ A state may also exact a license fee for the sale of liquors within the state on board a ferry boat engaged in interstate commerce and making landings at a port of the state.⁴

§ 20 (18). A state cannot tax interstate commerce.—Although the necessity for the regulation of commerce was the great moving force in the adoption of the constitution, and was thoroughly discussed in the proceedings of the convention and in the Federalist, there is in neither any reference to any possible interference with the taxing power of the state growing out of such regulation. The law of federal restraints upon state taxation has been developed upon the fundamental principle of the supremacy of the federal authority. The exemp-

¹ *Adams Express Co. v. Kentucky*, 214 U. S. 218, 53 L. Ed. 972 (1909).

² *Vance v. Vandercook*, 170 U. S. 438, 42 L. Ed. 1100; *Crescent Liquor Co. v. Platt*, 148 Fed. 894, C. C. W. V., holding invalid Act of West Va. In *U. S. ex rel. Friedman v. U. S. Express Co.*, 180 Fed. 1006, the Circuit Court of West Dist. of Ark. held that petitioner was entitled to writ of mandamus

to compel the express company to receive shipments of liquor for delivery to customers in Oklahoma under Interstate Commerce Act.

³ *Pabst Brewing Co. v. Crenshaw*, 198 U. S. 17, 49 L. Ed. 925.

⁴ *Fobplano v. Speed*, 199 U. S. 501, 50 L. Ed. 288, affirming 113 Tenn. 167. See also *Meyer et al. v. Mobile*, 147 Fed. 843, C. C. of Ala., holding valid a liquor ordinance under the Wilson Act.

tion from state taxation of the means employed by the federal government for carrying on its functions was first declared in 1819, in *McCulloch v. Maryland*,¹ and the principle was later extended in 1827, in *Brown v. Maryland*,² to the limitation of the state taxing authority by reason of the national control over foreign commerce.

Under the rule declared by the supreme court for the first time in 1886,³ which has since been consistently adhered to by the court, the business of carrying on interstate commerce cannot be taxed at all, and as the right to bring goods from other states includes the right to sell them and to solicit sales therefor, as well as to deliver the property sold, the state cannot tax the right to sell or deliver, or to solicit sales, whether in the form of license tax or otherwise. It is immaterial that the tax is without discrimination, as between domestic and foreign drummers, as interstate commerce cannot be taxed at all.⁴

§ 21 (19). But a state can tax the property employed in interstate commerce.—While a state cannot tax interstate commerce, that is, the privilege of carrying on such commerce, it can tax the property in its jurisdiction employed in carrying on such commerce. The difficulty of defining the line where the state and federal powers meet in such cases is illustrated by the not infrequent dissents of members of the supreme court in cases involving these questions of conflict between the state and federal power.⁵ No question is made as to the power of a state to tax the tangible property within its jurisdiction of a railroad, telegraph or other company engaged in interstate commerce, but the difficulty has been found in determining what portion of the intangible property of such corporations can be located within a state so as to be subject to its taxing power. Thus, has been formulated the so-called "unit rule" whereunder the entire value of an interstate railroad,

¹ *Supra*, § 5.

² *Supra*, § 17.

³ *Robbins v. Shelby County Taxing District*, 120 U. S. 489 (1887), 30 L. Ed. 694.

⁴ *Asher v. Texas*, 128 U. S. 129 (1888), 32 L. Ed. 368; *Brennan v. Titusville*, 153 U. S. 289 (1894), 38 L. Ed. 719; *Stockard v. Morgan*,

185 U. S. 27 (1902), 46 L. Ed. 785; *Caldwell v. North Car.*, 187 U. S. 622 (1902), 47 L. Ed. 336; *N. & W. R. R. Co. v. Sims*, 191 U. S. 441 (1902), 48 L. Ed. 254.

⁵ *Erie R. Co. v. Pennsylvania*, 158 U. S. 431, 1. c. 437 (1895), 39 L. Ed. 1043.

tangible as well as intangible, may be apportioned upon a mileage basis as a means, *prima facie*, of arriving at the value of the property within the state, that is, the state's proportionate part of the value of the entire property.¹

The rule of the "average habitual use" has also been formulated in the taxation of railroad cars, so that a state may tax its proportionate part of the property actually employed in its jurisdiction.²

Thus also while the receipts from interstate commerce cannot be taxed as such, the tax may be levied upon the corporation, as an excise or franchise tax, which may be apportioned on the basis of the proportion of the mileage within the state to the total mileage.³

These rules, however, are only admissible in determining the actual value of the property in the state for the purpose of taxation, and will not authorize the taxing by a state of the privilege of carrying on interstate commerce among the states, nor the taxation of property permanently outside of its jurisdiction.⁴

¹ *State Railroad Tax Cases*, 92 U. S. 575 (1875), 23 L. Ed. 663; *Kentucky Railroad Tax Cases*, 115 U. S. 321 (1885), 29 L. Ed. 414; *Pittsburgh etc. R. Co. v. Backus*, 154 U. S. 421 (1894), 38 L. Ed. 1031; *C. C. C. & St. L. R. Co. v. Backus*, 154 U. S. 439 (1894), 38 L. Ed. 1041; *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530 (1888), 31 L. Ed. 790; *Massachusetts v. Telegraph Co.*, 141 U. S. 40 (1891), 35 L. Ed. 628; *Western Union Tel. Co. v. Taggard*, 163 U. S. 1 (1896), 41 L. Ed. 49; *Adams v. Ohio*, 165 U. S. 194 (1897), 41 L. Ed. 683; *Adams Express Co. v. Kentucky*, 166 U. S. 171 (1897), 41 L. Ed. 960; *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150 (1897), 41 L. Ed. 953; *W. U. Tel. Co. v. Gottlieb*, 190 U. S. 412 (1903), 47 L. Ed. 1116.

² *Pullman Palace Car Co. v. Pennsylvania*, 141 U. S. 18 (1891),

35 L. Ed. 613; *Marye v. B. & O. R. Co.*, 127 U. S. 117 (1888), 32 L. Ed. 94; *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70 (1899), 43 L. Ed. 899; *Union Refrigerator Transit Co. v. Lynch*, 177 U. S. 149 (1900), 44 L. Ed. 708; *Wisconsin & M. R. Co. v. Powers*, 191 U. S. 379 (1903), 48 L. Ed. 229.

³ *The State Freight Tax Cases*, 15 Wall. 232 (1872), 21 L. Ed. 146; *Maine v. Grand Trunk R. Co.*, 142 U. S. 217 (1891), 35 L. Ed. 994. Four judges dissenting.

⁴ *Fargo v. Hart*, 193 U. S. 490 (1904), 48 L. Ed. 761; *Galveston etc. Co. v. Texas*, 210 U. S. 217, 52 L. Ed. 1131 (1908). For consideration of the many questions arising in the adjustment of the taxing power of the state to the paramount authority of congress in interstate commerce, see author's "Power of Taxation," chapters III and VIII.

§ 22 (20). **State power of taxation of corporations engaged in interstate commerce summarized.**—The supreme court,¹ in holding that a city could recover from an interstate telegraph company a reasonable license fee for the occupation of its streets by telegraph poles, subject however to the determination by a jury of the reasonableness of the charge, said that there were few questions more important or more embarrassing than those arising from the efforts of the states or municipalities to increase their revenues by collections from corporations engaged in interstate commerce, but that the following propositions had been so often adjudicated as to be no longer open to discussion: *First*. The constitution of the United States having given to congress the power to regulate commerce not only with foreign nations but among the several states, that power is necessarily exclusive whenever the subjects of it are national in their character or admit of only one uniform system or plan of regulation. *Second*. No state can compel a party, individual or corporation, to pay for the privilege of engaging in interstate commerce.² *Third*. This immunity does not prevent a state from imposing ordinary property taxes upon property having a situs in its territory and employed in interstate commerce. *Fourth*. The franchise of a corporation, although that franchise is the business of interstate commerce, is, as a part of its property, subject to state taxation, provided the franchise is not derived from the United States.³ *Fifth*. No corporation, even though engaged in interstate commerce, can appropriate to its own use property, public or private, without liability to charge therefor.

¹ *Atlantic, etc. Tel. Co. v. Philadelphia*, 190 U. S. 160 (1896), 47 L. Ed. 995.

² The soliciting of traffic for an interstate railroad is exempt from taxation. *McCall v. Cal.*, 136 U. S. 104 (1890), 34 L. Ed. 391. In 1868 before the adoption of the fourteenth amendment it was held in *Crandall v. Nevada*, 6 Wall. 35, 18 L. Ed. 745, that a state tax upon through passengers was void as inconsistent with the rights of cit-

izens of the United States, in free travel through the states, and not merely as an attempted regulation of commerce among the states. The opinion of Justice Miller quotes from the dissenting opinion of Chief Justice Taney in the *Passenger Cases*, *Infra*, § 23, where he concedes that the state tax imposed on foreigners would be invalid, if imposed on citizens.

³ *N. Y. ex rel. v. Miller*, 202 U. S. 584, 50 L. Ed. 1155.

CHAPTER II.

THE CONCURRENT AND EXCLUSIVE POWERS.

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- 39. Attachment of foreign railroad cars.
- 40. Rulings of the state courts on the commerce clause.

§ 23 (21). **The concurrent and exclusive powers distinguished.** The supremacy of the federal power in interstate commerce was declared in 1824, in *Gibbons v. Ogden* (*supra*, § 6), in a case wherein congress had exercised its power by authorizing the granting of coasting licenses, and the decision of the court therefore was based upon the claim of an exclusive grant by the state as against this right, under authority of congress, in the navigation of the public waters of the state. The question of the power of the state to legislate affecting interstate commerce, when congress had not legislated upon the subject, was not directly involved or decided; and this remained a *vexata quæstio*, and widely different views were expressed by members of the court, until a definite rule was declared in 1851.¹ Thus it was contended on the one hand that the power

¹ *Wilson v. Black Bird Creek* L. Ed. 412; *New York v. Miln*, 11 Marsh Co., 2 Peters, 245 (1829), 7 Peters, 102 (1837), 9 L. Ed. 648;

to regulate interstate commerce was itself a unit, and the grant to congress was necessarily exclusive, and no part of this regulation could be exercised by a state; and on the other hand that the grant to congress was not itself a prohibition to the states, and that this authority of the states in the exercise of their sovereign police powers was complete and exclusive.¹

The uncertainty produced by these differing opinions was shown in sustaining a New York statute² requiring masters of passenger vessels to report to the state authorities as to arriving passengers; while a few years later statutes of New York and Massachusetts imposing a tax upon passengers arriving from other states or foreign countries, for defraying expenses of police laws excluding paupers and convicts, the surplus to be applied to state purposes, were held void.³

In 1846 the laws of certain of the New England states, prohibiting or restraining the introduction of spirituous liquors were sustained, all the six judges filing opinions,⁴ and concurring in the judgment, though on different grounds.

Finally, in 1851, the rule was declared, which has been the basis of subsequent adjudications,⁵ that the power to regulate commerce is one which includes many subjects, various and quite unlike in their nature, and that whenever these subjects are in their nature national, or admit only of one uniform system or plan of regulation, they may be justly held to belong to that class over which congress has exclusive power of regulation; but that local and limited matters, not national in their nature, may be regulated by the states during the non-action of congress. The action of congress however renders void such regulations of the states as conflict with it.⁶

License Cases, 5 How. 504 (1847), 12 L. Ed. 256; Passenger Cases, 7 How. 283 (1849), 12 L. Ed. 702.

¹ See opinions in the Passenger and License Cases, *supra*.

² New York v. Miln, *supra*.

³ Passenger Cases, *supra*, four justices dissenting.

⁴ License Cases, *supra*. This decision was overruled in 1890; *Lelsy v. Harding*, *supra*, § 17.

⁵ *Cooley v. Board of Wardens*, 12 How. 299 (1851), 13 L. Ed. 996.

⁶ The rule has been stated in subsequent opinions without the qualification of the word "only," so as to read "admit of one uniform system or plan of regulation." See *State Freight Tax*, 15 Wall. 232, 21 L. Ed. 146; *Welton v. Missouri*, 91 U. S. l. c. 280 (1875), 23 L. Ed. 349; *Henderson v. Mayor*, 92 U. S. l. c. 259 (1875), 23 L. Ed. 543.

§ 24. (22). **The supreme court on the three classes of commerce cases.**—The supreme court in denying the power of a state to regulate tolls upon an interstate bridge without the assent of congress, reviewed its decisions upon the construction and application of the commerce clause of the constitution, and said they were divisible into three distinct classes.¹ The *first*, where the power of the state was exclusive, including the construction of highways, turnpikes, railroads and canals, between points in the same state, and their regulation for public use, the operating of bridges over navigable streams and regulating navigation over internal waters which did not by themselves or in connection with other waters form a continuous highway for interstate or foreign commerce. In the *second* class were included the cases of concurrent jurisdiction of the states, and wherein it is not the existence, but the *exercise* of the power of congress which is incompatible with the exercise of the same power by the states. In the *third* class the court included those cases where the power of congress was exclusive, and it was not the exercise but the *existence* of the power in congress which excluded the power of the state. The first class requires no distinct consideration. The dividing line between the second and third class has, however, been questioned in a number of cases, as will be seen in the succeeding sections.

§ 25 (23). **The concurrent state power.**—The concurrent jurisdiction of the states, as it is called, may be exercised in the second of the classes of cases mentioned in the preceding section, where it is not the existence but the exercise of the power of congress which is incompatible with the exercise of the state power.

Thus, the regulation of *pilots* has an intimate connection with commerce, and discriminating state laws might be enacted on the subject, yet the nature of the power is such that it is likely to be best provided for by the legislative discretion of the several states, adapted to local needs.²

In this essentially local class are the state inspection laws,³ state quarantine laws,⁴ and laws regulating the improvement

¹ Covington, etc. Bridge Co. v. Kentucky, 154 U. S. 204 (1894), 38 L. Ed. 962.

² Cooley v. Port Wardens, *supra*.

³ See § 10, *supra*.

⁴ Morgan's, etc., Co. v. Louisi-

of navigable waters within the jurisdiction of a state, or the use of bridges over such waters which have been sustained. In the Mobile harbor case cited,¹ the court said that perhaps some of the divergent views noticed upon this question of state power among former judges, may have arisen from not always bearing in mind the distinction between commerce as strictly defined and its local aids or instrumentalities, or measures taken for its improvement. In the Chicago case² the court sustained the state control of the construction, repair and regulation, and use of the bridges over the Chicago river, saying that until congress acted, the power of the state over the bridges was plenary.

In the same class are state laws regulating *wharves*, *piers* and *docks*,³ the construction of *bridges*,⁴ and establishing *ferries* over navigable rivers within state jurisdiction. Local regulations, however, cannot impose a tax or charge upon interstate commerce. Thus, while a state can exact a toll or compensation for a specific improvement of a navigable water within its jurisdiction,⁵ it cannot exact a license for the use of navigable waters, which is not a charge for any specific improvement.⁶

§ 26 (24). The state power as to interstate telegraph companies.—A telegraph company doing an interstate business is engaged in interstate commerce, and is so recognized by act of congress.⁷ It cannot therefore be excluded by a state, nor can its interstate messages be taxed by the state.⁸

A state cannot, as a condition of authorizing a foreign telegraph company to do local business in the state, exact a char-

ana, 118 U. S. 455 (1886), 30 L. Ed. 237. *Infra*, § 36.

¹ County of Mobile v. Kimball, 102 U. S. 691 (1880), 26 L. Ed. 238.

² Escanaba Co. v. Chicago, 107 U. S. 678 (1882), 27 L. Ed. 442.

³ Packet Co. v. Aiken, 121 U. S. 444 (1887), 30 L. Ed. 976.

⁴ Cardwell v. Am. Bridge Co., 113 U. S. 205 (1885), 28 L. Ed. 959.

As to interstate bridges and ferries and cases cited, see Gloucester Ferry Co. Case, 114 U. S. 196 (1885), 29 L. Ed. 158; St. Clair

County v. Interstate Sand & Car Transfer Co., 192 U. S. 454 (1904), 48 L. Ed. 518.

⁵ Huse v. Glover, 119 U. S. 543 (1886), 30 L. Ed. 487; Sands v. Manistee River Imp. Co., 123 U. S. 288 (1887), 31 L. Ed. 149.

⁶ Harman v. Chicago, 147 U. S. 396 (1893), 37 L. Ed. 216.

⁷ Act of July 24, 1866, Comp. Stats. 5263; Pensacola Tel. Co. v. W. U. Tel. Co., *supra*.

⁸ Telegraph Co. v. Texas, 105 U. S. 460 (1881), 26 L. Ed. 1067.

ter fee of a given percent of the entire authorized capital stock of the company, as that would be in effect a burden and tax upon the company's interstate business and on its property located or used outside of the state and in such a case, it is immaterial that the state disclaims the purpose of obstructing or embarrassing interstate commerce.¹ The state may, however, make regulations with respect to building poles, location of wires, and all necessary appliances, which the convenience of the community may require. It can tax *intrastate* messages, and municipalities may charge a reasonable rental for occupation of streets with poles.² The state can prescribe how messages shall be delivered within the state, whether received from within or without the state,³ as this is the exercise of the police authority of the state in its jurisdiction; but on the contrary, the state cannot prescribe how messages received within, but delivered without the state, shall be delivered.⁴

Interstate commerce is not unconstitutionally regulated by a state statute of Michigan under which, as construed by the state courts, a telegraph company cannot limit its liability for its negligent failure to deliver a telegram addressed to a person in another state. Such a regulation would be valid if rested upon the common law of the state and is no less valid because made by a state statute.⁵

§ 27 (25). Concurrent powers in interstate railroad transportation.—Not only is the rule established that the state, in

¹ *Western U. Tel. Co. v. Coleman*, 216 U. S. 1, 54 L. Ed. 355 (1910).

² *Telegraph Co. v. Philadelphia*, 190 U. S. 160 (1903), 47 L. Ed. 995.

³ *Western U. Tel. Co. v. James*, 162 U. S. 650 (1896), 40 L. Ed. 1105.

⁴ *Western U. Tel. Co. v. Pendleton*, 122 U. S. 347 (1887), 30 L. Ed. 1187. The Virginia statute imposing penalty for failure to deliver telegraph messages has no operation in limits of Norfolk Navy Yards. *Western U. Tel. Co.*

v. Childs, 214 U. S. 274, 53 L. Ed. 994, citing and following *Fort Leavenworth R. R. Co. v. Love*, 114 U. S. 525, 29 L. Ed. 264 (1885). In *Ivy v. Western U. Tel. Co.*, 165 Fed. 371, E. D. of Ark. (1908), the Arkansas statute allowing damages for mental anguish, etc., in actions against telegraph companies, was held valid, though incidentally affecting interstate transactions.

⁵ *Western U. Tel. Co. v. Commercial Union Co.*, 218 U. S. 408, 54 L. Ed. 1088 (1910).

the absence of congressional action, may regulate local matters which relate to interstate or foreign commerce, but the state power of regulation has been further extended and held to include a wide field in the exercise of its lawful power over the relations of persons and property in its jurisdiction. The federal power of regulation may be exercised without legislation, as well as with it, and by inaction, congress in effect adopts the local law. State laws regulating the relative rights and duties of persons within the jurisdiction of the state are therefore effective upon interstate carriers.¹ The court said in the case cited that it is to this law that persons within the scope of its operation look for the definition of their rights and for the redress of wrongs. "The failure of congress can be construed only as an intention not to disturb what exists, and is the mode by which it adopts, for cases within its power, the rule of the state law, which, until displaced, covers the subject."²

Upon this principle the state regulation, in the absence of congressional action, of the manner in which interstate trains shall approach dangerous crossings and the giving of signals and control of trains under such circumstances, has been sustained,³ yet, it was said in the same opinion that statutes requiring the speed of such trains to be checked at all crossings, where numerous and near together, might be practically destructive to the successful operation of passenger trains and a direct burden upon interstate commerce.

The effect of the enactment of congress upon the police power of the state is illustrated by the ruling of the supreme court prior to the enactment of the interstate commerce act⁴ holding valid a statute of Iowa requiring each railroad company annually, in the month of September, to establish passenger and freight rates, and on the first day of October following to put up at all the stations on its road a printed copy of such rates and cause it to remain posted during the year, notwithstand-

¹ *Smith v. Alabama*, 124 U. S. 465, 31 L. Ed. 508.

² *Sherlock et al. v. Alling*, 93 U. S. 99 (1876), 23 L. Ed. 819; *Chicago, etc., R. Co. v. Solan*, 169 U. S. 133 (1898), 42 L. Ed. 688.

³ *Southern R. R. Co. v. King*, 217 U. S. 324, 54 L. Ed. 868 (1910), affirming 160 Fed. 332, C. C. A. 5th Cir.

⁴ *Railroad Co. v. Fuller*, 17 Wall. 560 (1873), 21 L. Ed. 710.

ing the act of congress of 1866¹ authorizing the interstate carriage of freight. The state statute was held to be simply a police regulation, and that even though it did effect commerce, the question would arise whether it did not fall within that class of cases where state legislation was sustained in the absence of congressional legislation. A similar statute came before the court from Texas after the passage of the interstate commerce act, although the statute had been enacted before.² The court said that the state law and the national law operated upon the same subjectmatter and prescribed different rules, and that the state statute must therefore give way.

§ 28 (26). State Sunday laws and interstate transportation.—Included in this range of the concurrent state power regulating persons within the jurisdiction and affecting interstate commerce are Sunday laws, prohibiting the running of freight trains on Sunday.³ The court said such a law merely established a rule of civil conduct applicable to all freight trains, domestic as well as interstate, and to all similar traffic.

The court in this case sustained a Georgia statute and quoted from the opinion of the supreme court of that state which said that the legislature had the right to enforce a day of rest as a civil duty, although men might differ as to the religious duty.

§ 29 (27). State laws as to qualifications of employes and safety of the public.—The principle has been extended to include laws which establish a standard of qualifications for railroad employes⁴ on interstate as well as local trains, for example, color blindness of engineers. The court said in the latter case that it was a principle fully recognized that wherever there is danger to the public in the conduct of a business, it was not only within the power, but the plain duty of a state to make provision against accidents likely to follow. State laws requiring the heating of passenger cars, requiring guard

¹ *Infra*, § 42.

² *Gulf, Colo. etc. R. Co. v. Hefley*, 158 U. S. 98 (1895), 39 L. Ed. 910.

³ *Hennington v. Georgia*, 163 U. S. 299 (1896), (Fuller, C. J. and

White, J., dissenting), 41 L. Ed. 166.

⁴ *Smith v. Alabama*, 124 U. S. 465 (1888), 31 L. Ed. 508; *Nashville, etc. R. Co. v. Alabama*, 128 U. S. 96 (1888), 32 L. Ed. 352.

posts on railroad bridges and trestles,¹ the protection of surface crossings in cities,² and the regulation of speed in municipal limits,³ are sustained upon the same principle. The court said that travelers on interstate trains are as much entitled, while within a state, to the protection of that state as those who travel on domestic trains.

Congress has also enacted legislation, as will be seen hereafter for the safety of employes and the prevention of accidents in interstate commerce. These acts, as the Accident Act, *infra*, and the Safety Act, *infra*, are by their terms applicable to all railroads engaged in interstate commerce. From the nature of the subject it is difficult to say when the enactment of such legislation by congress so covers the ground as to make inoperative state legislation bearing upon the same subject. Under the ruling laid down by the supreme court in the live stock cases (see *infra*, § 35), the state statute enacted for the protection of employes and travelers within its jurisdiction must be taken as valid, unless the same subject is taken under direct national supervision in the exercise of the lawful power of congress over interstate commerce.

Under this principle it was held that a state could lawfully prescribe a minimum of three brakemen for freight trains of more than twenty-five cars operated in the state, and that such a regulation was valid when applied to a foreign railway when engaged in interstate commerce. The court said that such a statute, enacted for the safety of all engaged in the business, was not in any sense a regulation of interstate commerce.⁴

§ 30 (28). State laws concerning separation of races in interstate traffic.—A state can regulate the separation of races in railroad transportation on trains within the state,⁵ but it

¹ N. Y., N. H. & H. R. Co. v. New York, 165 U. S. 628 (1897), 41 L. Ed. 853. Ed. — (1911), affirming 86 Ark. 412.

² Southern R. R. Co. v. King, *supra*.

³ Erb v. Morasch, 177 U. S. 584 (1900), 44 L. Ed. 897.

⁴ Chicago, R. I. & Pac. R. R. Co. v. Arkansas, 219 U. S. 453, 55 L.

⁵ L., N. O. & T. R. Co. v. Mississippi, 133 U. S. 587 (1890), 33 L. Ed. 784, distinguished Hall v. De Cuir, 95 U. S. 485, 24 L. Ed. 547; C. & O. R. Co. v. Kentucky, 179 U. S. 388, 45 L. Ed. 244; Plessy v. Ferguson, 163 U. S. 537 (1896), 41 L.

cannot determine whether white and colored interstate passengers shall be compelled to share their cabin accommodations on steamboats, as that is a question of interstate commerce to be determined by congress alone. A statute of Louisiana enacted in 1869, prohibiting discrimination on account of race, was held inapplicable to a Mississippi steamboat engaged in commerce between the states;¹ while the state laws providing for separate cars within the state, were sustained.

Congressional inaction is equivalent to a declaration that an interstate carrier may by its own regulations separate white and colored passengers.²

§ 31 (29). Limitation of state power in stoppage of through trains.—The limitation of the state's power of regulation in relation to interstate commerce is illustrated by the rulings of the supreme court upon state laws requiring the stoppage of trains at certain stations.

A statute of Minnesota requiring every railroad company to stop all regular trains at county seats, but providing that it should not apply to other railroad trains entering the state from another state, or to transcontinental trains from another state, was sustained as to a train connecting with an interstate train and carrying mails and some interstate passengers for that train.³ This case, however, was decided upon its special

Ed. 256. In *McCabe v. A. T. S. F. R. Co.*, 186 Fed. 966 (1911), C. C. A. 8th Circuit, the court affirmed the dismissal of the bill of complaint filed by negro citizens of Oklahoma in seeking to enjoin the railway companies from obeying the Oklahoma statute (Laws of Okla. p. 271), requiring railroad companies to provide separate coaches for the races equal in all points of comfort and convenience alleging that the defendants were not furnishing cars and waiting rooms for the negro race equal to those furnished for white race. The court held that the statute must be construed to apply to intrastate commerce only, and when

so construed it was not violative of the commerce clause of the federal constitution. There was no obligation on the railroad to hold the sleeping cars, dining or chair cars for the separate use of either race, and the equal protection of the laws was not denied by their failure to do so. Equality of service did not mean identity of service. Sanborn J. dissenting.

¹ *Hall v. DeCuir, supra.*

² *Chiles v. C. & O. R. R.*, 218 U. S. 71, 54 L. Ed. 936 (1910), affirming 125 Ky. 299.

³ *Gladson v. Minnesota*, 166 U. S. 427 (1897), 41 L. Ed. 1064; *L. S. & M. S. R. R. v. Ohio*, 173 U. S. 285, 43 L. Ed. 702 (1899).

facts, as the train was run wholly within the state. A statute of Illinois was held invalid which required all regular passenger trains to stop a sufficient length of time at county seats to receive and let off passengers with safety, as a direct interference with interstate traffic. This statute was held invalid both as to a county seat station which was three and one-half miles from the direct road¹ and also as to a county seat station which was on the direct line.² In the case last cited the court reviewed the previous decisions and said that none of them were opposed to the principle that, after all local conditions had been adequately made, railways had the legal right to adopt special provisions for through traffic, and that legislative interference therewith was unreasonable and an infringement upon the constitutional guaranty of the freedom of interstate commerce.

In determining the validity of a state order, requiring the stoppage of interstate railroad trains, the supreme court will consider the adequacy of the local facilities existing at such station, as their existence is involved in the determination of the federal question whether the order does or does not directly regulate interstate commerce.³

¹ *Illinois Central R. Co. v. Illinois*, 163 U. S. 142 (1896), 41 L. Ed. 107.

² *Cleveland, etc., R. Co. v. Illinois*, 177 U. S. 514 (1900), 44 L. Ed. 868.

³ In *Atlantic Coast Line R. R. Co. v. Wharton*, 207 U. S. 328, 52 L. Ed. 230 (1907), reversing 74 S. C. 80. The court held that a state order requiring a railroad company to stop, on signal, two of its fast mail trains running between Jersey City and Tampa, Florida, at a small town in South Carolina, which was also the junction point with a small branch road was void, where, in addition to several local trains daily, the town was furnished daily one slower through train, each way.

The order of the supreme court of the state granting a mandamus compelling the railroads to stop the trains was held reviewable on writ of error. In *Herndon v. C., R. I. & P. R. R. Co.*, 218 U. S. 135, 54 L. Ed. 970 (1910), a statute of Missouri requiring the stoppage of interstate trains at junction points was held an unnecessary and unlawful burden upon interstate commerce, when ample facilities for the traveling public were already provided. In this case the court affirmed a decree enjoining the secretary of state from revoking the company's license and right to do local business because of bringing suit in the federal court.

§ 32 (30). **State regulation of contractual relations of interstate railroad and shippers.**—The contract relations of interstate railroads with their shippers must be determined, in the absence of congressional legislation, by the local law of the place where the contract is made. State statutes regulating the contractual relations and changing the common-law rules controlling such relations are within the scope of the state's regulating power. Thus statutes permitting the carrier to limit his common-law liability to a stipulated valuation, regulating the effect of an agreement limiting liability to the carrier's own line in a shipment to be made over other lines, and also prohibiting contractual exemption from any common-law liability of the carrier, have been sustained. In the Hughes case¹ it was said by the supreme court, in allowing a judgment against an interstate carrier in excess of the amount limited in the bill of lading on the ground that no federal right was denied, that although congress had made it obligatory to provide proper facilities for the interstate carriage of freight and had prevented carriers from obstructing continuous shipments on interstate lines, there was no sanction of agreements limiting liability by stipulation, and until congress had legislated upon it there was no valid objection to the states enforcing their own regulations upon the subject, although they may to that extent affect interstate contracts of carriage.²

¹ *Pennsylvania R. Co. v. Hughes*, 191 U. S. 477 (1903), 48 L. Ed. 268.

² *Richmond, etc., R. Co. v. Tobacco Co.*, 169 U. S. 311 (1898), 42 L. Ed. 759. A contract for through transportation from Oklahoma to New York was held subject to the Oklahoma law to the extent that such law was not an invasion of the exclusive rights of congress, and under this law the exemption of the bill of lading was not binding upon the shipper in the absence of his assent in writing. *Erie R. Co. v. Pond Creek Mill & Elevator Co.*, C. C. A. 7th Circuit,

162 Fed. 878 (1908). While congress has not legislated upon the forms of bills of lading in interstate commerce, it has, by the enactment of the Harter Act, U. S. Compiled Statutes, 1901, p. 2946, legislated concerning the forms of maritime bills of lading and controlling the insertion of stipulations therein limiting the responsibility of carriers. See case of *The Delaware*, 161 U. S. 459 (1896), 40 L. Ed. 771. By provision of the Act of 1906, known as the Railroad Rate Bill of that year, congress has regulated the issue of bills of lading, fixing the responsibility

§ 33 (31). State regulation under rules of common law in state courts.—It is immaterial, in this exercise of the state's lawful power over persons and property within its jurisdiction, whether the enforcement by the state of its power in the regulation of relative rights and duties of persons and corporations within its limits is enacted into a statute or results from the rules of law enforced in the state courts. The state, said the supreme court, has a right to promote the welfare and safety of those within its jurisdiction by requiring carriers to be responsible to the full measure of the loss resulting from their negligence, a contract to the contrary notwithstanding.

The penalizing of the failure of a common carrier to adjust and pay within a specified time claims for loss or damage under state law does not unlawfully interfere with interstate commerce, even as applied to shipments from without the state, where the statute is construed by the state court as affecting only the liability of carriers doing business in the state for property lost or damaged while in their possession.¹

In the absence of action by congress or the Interstate Commerce Commission, a railway company may be compelled by mandamus to resume the transfer and return of cars loaded and unloaded from the line of a connecting carrier to a flour mill and elevator of a shipper, upon request and demand of the shipper and the payment of customary charges.²

On the other hand, a statute which is calculated to impose heavy penalties for trivial, accidental and unintentional violations of duty, as the failure of a railroad company to furnish cars to a shipper within a certain number of days after the latter's requisition in writing, in the sum of \$25 a day for each car not furnished and admitting of no excuse except as arising from wars or other calamity, is an unconstitutional regulation of interstate commerce.³

upon the initial carrier; Held valid by the supreme court. See *infra*, § 407.

¹ *Atlantic C. & L. P. Cp. v. Mazurski*, 216 U. S. 122, 54 L. Ed. 411 (1910).

² *Mo. Pac. R. R. Co. v. Laraby*

Flour Mill Co., 211 U. S. 612, 53 L. Ed. 352 (1908).

³ *H. & T. C. R. Co. v. Mayes*, 201 U. S. 321, 50 L. Ed. 772 (1906), reversing 36 Tex. Civ. App. 606, 609. Also *St. Louis S. W. Ry. Co. v. Arkansas*, 217 U. S. 136, 54 L. Ed.

The state regulations in these cases were sustained upon the theory that they are not in themselves regulations of interstate commerce, though they control in some degree the conduct and liability of those engaged in the commerce, and as long as congress had not legislated upon the particular subject, they are to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the state to regulate the relative rights and duties of persons and corporations within its limits.¹

This lawful exercise of the police power of the state over persons and things within its jurisdiction is illustrated by the rulings of the supreme court sustaining the power of the state to regulate the sale of patent rights, or articles covered by letters-patent of the United States. The court said that congress never intended that the patent laws should displace the police powers of the state, that is, those powers by which the health, good order, peace and general welfare of the community are promoted, provided such laws do not discriminate against non-residents.²

§ 34 (32). The concurrent jurisdiction in live stock inspection laws.—The concurrent jurisdiction of the state and federal governments in interstate commerce is well illustrated in the matter of state laws regulating the exclusion of diseased cattle. The danger of the communication of disease in driving or otherwise transporting cattle from state to state has been recognized both in the legislation of the western states as well as in that of the federal government. The right of the state to protect its people and property against such dangers by reasonable enactments, not going beyond the necessities of the case, has been affirmed in several cases,³ but this right of protection against diseased cattle did not justify the absolute prohibition against certain cattle within certain seasons.⁴ The

698 (1910), reversing 85 Ark. 311. See also *McNeil v. Southern Ry. Co.*, 202 U. S. 543, 50 L. Ed. 1142 (1906); *Mississippi R. R. Co. v. Ill. Central R. R. Co.*, 203 U. S. 335, 51 L. Ed. 209 (1906), and affirming 128 Fed. 327.

¹ *Chicago, M. & St. P. R. Co. v.*

Solan, 169 U. S. 133 (1898), 42 L. Ed. 688.

² *Webber v. Virginia*, 103 U. S. 344 (1881), 26 L. Ed. 565.

³ *Kimmish v. Ball*, 129 U. S. 217 (1889), 32 L. Ed. 695.

⁴ *Hannibal & St. Joe Railroad Co. v. Husen*, 95 U. S. 465 (1879), 24 L. Ed. 527.

right of inspection of animals or of anything intended for human food brought into the state from another state is conceded, but such inspection must be reasonable, and a state law is invalid which is burdened with such conditions, as would prevent the introduction into the state of sound meats, the product of animals slaughtered in other states.¹ In this case the act required inspection twenty-four hours before slaughtering, and this necessarily included all meats from animals slaughtered in other states.

§ 35 (33). Effect of congressional legislation upon concurrent state power.—In the second class of cases, *supra*, section 24, where it is not the existence, but the exercise, of the power of congress which is incompatible with the exercise of the same power by the states, and wherein, by inaction, congress in effect adopts the local law, the question necessarily arises whether an act of congress in this field of concurrent legislation has the effect of nullifying the state statutes on the same subject. This question must be determined by the scope and terms of the act of congress, that is, whether or not it covers the whole subject, thus excluding the exercise of the state power.

Thus congress has legislated on the subject of the transportation of live stock,² and has authorized the investigation and

¹ *Minnesota v. Barber*, 136 U. S. 313, 34 L. Ed. 455 (1890); *Brimmer v. Redman*, 138 U. S. 78 (1890), 34 L. Ed. 862.

² Act of May 29, 1884, c. 60, and Act of Aug. 30, 1890, c. 839, chap. 3 Comp. Stats. pp. 3182 to 3193.

A statute of Kansas, making it a misdemeanor to transport into the state cattle from any point south of the south line of the state, except for immediate slaughter, without having first caused them to be inspected and passed as healthy by the proper state officials or by the bureau of animal industry of the interior department of the United States, was

sustained as consistent with the federal legislation on the same subject and with the powers to control the interstate movement of cattle liable to be afflicted with a communicable disease, which had been conferred upon the secretaries of agriculture by the Act of February 2nd, 1903. *Asbell v. Kansas*, 209 U. S. 251, 52 L. Ed. 778 (1908).

This Act of August 30, 1890, in so far as it provided for the inspection of the slaughtering and packing with a state of cattle intended for exportation, was denied; and the party indicted for bribing an inspector was dis-

inspection of cattle intended for interstate commerce, and has made unlawful the transportation of cattle known to be diseased. Though it was argued that this exercise of the federal power of regulation had the effect of nullifying or suspending the state statutes on the subject, the supreme court held,¹ that the act of congress did not cover the whole subject of the transportation of live stock from one state to another, and that the statutes of Kansas and Colorado related to matters not covered by such act.

The statute of Kansas imposed a civil liability upon the railroad company bringing diseased cattle into the state, and that of Colorado made it a misdemeanor to bring into the state cattle which had been herded within ninety days prior to their importation with cattle having a contagious disease.² The court said that the state, not having assumed charge of the matter as involved in interstate commerce, could protect its people and their property against such dangers. When the entire subject of the transportation of live stock from one state to another is taken under direct national jurisdiction, and a system devised by which diseased stock may be excluded from interstate commerce, all local or state regulations in respect of such matters and covering the same ground would cease to have any force, whether formally abrogated or not, and such rules and regulations as congress may lawfully prescribe or authorize would alone control. The power, said the court, may thus be suspended until national control is abandoned and the subject thereby left under the police power of the state.³

This class of cases, where the exercise of the power of congress nullifies the statutes of the state enacted in the exercise of this concurrent jurisdiction, is illustrated in the effect of the enactments of congress regulating the hours of labor and other conditions of employment of the employes of railroads engaged in interstate commerce. Thus, the act of con-

charged on the ground that congress had no power to provide for the inspection of a manufacturing business within the limits of the state. *U. S. v. Boyer*, 85 Fed. 425 (W. Dist. of Mo.) (1898).

¹ *Missouri, Kansas & Texas R.*

Co. v. Haber, 169 U. S. 613 (1898), 42 L. Ed. 878; *Reid v. Colorado*, 187 U. S. 137 (1902), 47 L. Ed. 108.

² *Rasmussen v. Idaho*, 181 U. S. 198 (1901), 45 L. Ed. 820.

³ *R. R. Com. of Ohio v. Worthington*, 187 Fed. 965 (1911).

gress of 1907, known as the Nine Hour Law,¹ prohibiting the employment of certain employes in interstate commerce for a longer period than nine hours, was adjudged by the supreme courts of both Missouri and Wisconsin to make inoperative the laws of their respective states fixing a maximum of eight hours.² In these cases it is held, while the state acts were valid in the absence of congressional legislation and applied to all employes whether engaged in interstate commerce or not, the act of congress was a clear declaration that the employers engaged in interstate commerce should be under federal, and not state regulation. The effect of the enactment was therefore to make inoperative the state laws.

It was said by the supreme court, in sustaining a state statute as to the qualifications of certain railway employes in the absence of congressional legislation,³ that it was conceded that the power of congress to regulate interstate commerce is plenary; that, as incident to it congress may legislate as to the qualifications, duties, and liabilities of employes and others on railway trains engaged in that commerce; and that such legislation will supersede any state action on the subject.

§ 36 (34). **State quarantine laws.**—The quarantine law established by the state of Louisiana⁴ was also sustained, the court saying that those state quarantine laws were a rightful exercise of the police power of the state for the protection of health, and although some of the rules of this system amounted to regulation of commerce with foreign nations, they belonged to the class which the state could establish, until congress acted in the matter by covering the same ground or by forbidding state laws, and congress had in effect adopted the laws of the state and forbidden interference with their enforcement.⁵

¹ See *infra*, § 540.

² *State v. Missouri Pacific R. R. Co.*, 212 Mo. 658 (1908), and *State of Wisconsin v. C., M. & St. P. Ry. Co.*, 136 Wis. 407. The same ruling was made as to the Employer's Liability Act of 1908 as superseding the Arkansas statute in *Fulham v. Railway Co.*, 167 Fed. 660, W. D. of Ark. (1909), and as

superseding the Georgia statute in *Dewberry v. Southern Railway Co.*, 175 Fed. 307, N. D. of Ga. (1910).

³ *Nashville, etc., R. R. Co. v. Alabama*, *supra*.

⁴ *Morgan's, etc., Co. v. Louisiana*, 118 U. S. 455 (1886), 30 L. Ed. 237.

⁵ In *I. C. R. R. v. McKendree*,

§ 37 (35). Freedom of interstate commerce.—The right of interstate commerce, that is, the right of conducting traffic and commercial intercourse between the states, is independent of state control, and where freedom of commerce between the states is directly involved, the non-action of congress indicates its will that the commerce should be free and untrammelled, and the states cannot interfere therewith either through their police power or their taxing power.

This freedom of interstate commerce from state control was definitely established as to the taxing power of the state in the case of the State Freight Tax,¹ in 1873, and later, in 1887, in the case of *Robbins v. Shelby County Taxing District*.² The freedom of interstate commerce with respect to the police power of the state was also declared in the cases relating to the liquor traffic.³ Finally, in 1886, in the *Wabash Railway* case,⁴ the supreme court held that a statute of a state, intended to regulate or to tax or to impose any other restrictions upon the transmission of persons and property or telegraph messages from one state to another, was not within that class of legislation which the states could enact in the absence of legislation by congress, and that such statutes are void even as to that part of such transmission which may be within the state. The statute of Illinois therefore regulating railroad charges was held to have no application to an interstate shipment even as to that part of the distance which lay within the state of Illinois, and the regulation of interstate commerce from the beginning to the end of the shipment was confided to congress exclusively under the power to regulate commerce among the states.

In 1894 this principle was extended to an interstate bridge, and it was held that the bridge was an instrument of interstate commerce whereon congress alone possessed the power

203 U. S. 514, 51 L. Ed. 298 (1906), the court held that the quarantine regulations promulgated by the secretary of agriculture, under Act of Feb. 2, 1903, were void as in excess of the powers conferred by that act where on their face they

apply as well to intrastate as to interstate commerce.

¹ See 15 Wall. 232, 21 L. Ed. 146.

² See *supra*, § 20.

³ See *supra*, § 10.

⁴ *Wabash R. Co. v. Illinois*, 118 U. S. 557 (1886), 30 L. Ed. 244.

to enact a uniform schedule of charges, and that the authority of the state was limited to fixing tolls of such channels of commerce as were exclusively within its territory.¹ The court in reviewing the cases said, that in none of the subsequent cases had any disposition been shown to limit or qualify the doctrine laid down in the *Wabash* case.

The freedom of interstate commerce from state control forbids any legislation discriminating against the products of other states. This principle has been applied to statutes imposing discriminating taxes or other discriminations against importations from other states in case of the liquor traffic. Thus, a Michigan statute imposing a specific tax on persons engaged in the business of selling liquors at wholesale or soliciting or taking orders for liquors to be shipped into the state, not having their usual place of business in the state, without imposing the same tax upon persons engaged in the liquor business in reference to liquors manufactured in the state, was held void.² It was claimed that this could be sustained as a tax on occupations, but the court said that an occupation could not be taxed if the tax is so specialized as to operate a discriminating burden against the introduction and selling of the products of another state or against the citizens of another state. Upon the same principle the dispensary laws of South Carolina, regulating the sale of intoxicating liquors and prohibiting their importation,³ were held void, the court holding that as the state recognized the sale, manufacture, and use of intoxicating liquors as valid, it could not discriminate against their being imported from other states.

The right to carry on commerce among the states is subject only to the regulation of congress, and as to this fundamental right to conduct such commerce, it is not the exercise but the existence of the power in congress which excludes all state control and interference whether under the taxing or the police power.⁴

¹ *Covington, etc., Bridge Co. v. Vandercook*, 170 U. S. 468 (1898), 42 L. Ed. 1111.
Kentucky, 154 U. S. 204 (1894), 38 L. Ed. 962.

² *Walling v. Michigan*, 116 U. S. 446, 29 L. Ed. 691 (1886).
³ *Chicago, etc., R. Co. v. Solan*, 169 U. S. 133 (1898), 42 L. Ed. 688;
Pennsylvania R. Co. v. Hughes,

⁴ *Scott v. Donald*, 165 U. S. 58, 41 L. Ed. 632 (1897); *Vance v. In Missouri Pacific R. R. Co. v.*

This freedom from state control in the carrying on of interstate commerce must however be reconciled with the general police power of the state in regulating persons, corporations and property within its jurisdiction, and in determining their relative rights and obligations. Thus while a state cannot impose any tax upon interstate commerce as such, nor restrict the persons or things to be carried therein, nor regulate the rate of tolls, fares or freight, or interfere with through trains, or exclude any lawful subjects of commerce, it can prescribe rules for the construction of railroads and their management and operation for the protection of persons and property. Such rules are not in themselves regulations of interstate commerce, although they may control in some degree the conduct and liability of those engaged in such commerce. While the line of distinction is not always clear between what is a lawful regulation of persons and property within the jurisdiction and what is a regulation of interstate commerce conducted by such persons or with such property, the rule remains as declared in the *Wabash* case, that it is not the exercise but the existence of the power in congress which makes void any action by the states regulating such commerce.

The distinction between the lawful exercise of the power of the state in regulating the relative rights and duties of those subject to its jurisdiction and the unlawful regulation of interstate commerce was illustrated in two cases where state legislation undertook to deal with the liability of carriers in interstate shipments of goods damaged on connecting lines. A Virginia statute, providing that a carrier might make any limitation as to its liability on an interstate shipment beyond its own line which it deemed proper, providing only the evidence was a contract in writing and signed by the shipper,¹ and that the carrier should be liable unless within a reasonable time he gave satisfactory proof to the consignor that the loss or injury did not occur while the thing was in his charge, was sustained

Castle, C. C. A. 8th Circuit, 172 Fed. 841 (1909), the Act of Nebraska, abolishing the fellow-servant rule and adopting the rule of comparative negligence and requiring all questions of negligence and contributory negligence to be submitted to the jury, was sus-

tained and held applicable to interstate railroads in the absence of valid legislation of congress, the Employer's Liability Act of 1906 having been held invalid.

¹ *Richmond & A. R. Co. v. Patterson Tobacco Co.*, 169 U. S. 311, 42 L. Ed. 759 (1898).

by the supreme court. Such a provision, the court said, was a reasonable one and not a regulation of interstate commerce. On the other hand, a Georgia statute, which, as construed by the supreme court of that state, applied to interstate shipments and imposed upon the carrier, as a condition of availing itself of a valid contract of exemption from liability beyond its own line, the duty of tracing the freight and informing the shipper when, where, and how, and by which carrier, the freight was lost, damaged or destroyed, and of giving the names of the parties and their official position, if any, by whom the truth of the fact set out in the information could be established, was, when applied to an interstate shipment, in violation of the constitution.¹ The court distinguished this case from the Virginia case in that the carrier was made liable for the negligence of another carrier over whose track it had no control, unless it obtained information which it had no means of compelling another carrier to give. The court said this was not a reasonable regulation in aid of interstate commerce but a direct and immediate burden upon it.²

§ 38 (36). Congressional inaction in foreign and interstate commerce distinguished.—In one of the “original package” cases, *Bowman v. Railroad Company*,³ where the supreme

¹ *Central of Georgia R. Co. v. Murphey*, 196 U. S. 194, 49 L. Ed. 444.

² In *St. Louis, I. M. & S. Ry. Co. v. Hampton*, U. S. Circuit Court E. D. of Ark., 162 Fed. 693 (1908), the act of Arkansas regulating freight transportation and making an absolute requirement for furnishing cars therein, was held an unlawful interference with interstate commerce.

In *St. Louis & S. F. R. Co. v. Allen*, 181 Fed. 710 (1910), a rule of the Railroad Commission of Arkansas providing that in case of failure on the part of the shipper to give routing instructions it should be the duty of the railroad receiving the shipment to forward it via such route as would

make the lowest rate, was, as applied to interstate shipments, an unlawful interference with interstate commerce.

In *Globe Elevator Co. v. Andrew*, C. C., W. D. of Wis., 144 Fed. 871 (1906), on a motion for preliminary injunction, an act of Wisconsin providing for the inspection and grading of grain of Superior City, and requiring all grain to be sold and delivered under certain grades established, and prohibiting any sales or deliveries under Minnesota grades (the city being on the state line), was an attempted regulation of interstate commerce and therefore void.

³ *Bowman v. Chi. & N. W. R. Co.*, 125 U. S. 465 (1888), 31 L. Ed. 700.

court first laid down the rule that in interstate commerce the inaction of congress meant freedom of commercial intercourse as to any lawful subject of commerce in the "original package,"¹ it was suggested that while the two powers over interstate and foreign commerce are contained in the same clause and in the same term, the same inference was not always to be drawn from the absence of legislation by congress. Laws which concern the exterior relations of the United States with other nations and governments are general in their nature, and the people of the several states can have no relation with foreign powers in respect to commerce or any other subject except through the government of the United States, its laws and treaties. The question was therefore to be considered in each case, as it arises, whether the fact that congress has failed in the particular instance to provide by law a regulation of commerce among the states is conclusive of the intention that the subject shall be free from all positive regulation, or that until it positively interferes such commerce may be left free to be dealt with by the respective states.

§ 39 (37). Attachment of foreign railroad cars.—An interesting question, which has been differently ruled upon in the state courts,² as to the liability of cars of a foreign railroad company, while in a state in the custody of another company, to attachment under legal process in such state, has been definitely decided by the supreme court, and it is held that such cars are subject to attachment under state laws notwithstanding the provisions of the interstate commerce act and of the act of congress, securing continuity of transportation.³

The court said in this opinion⁴ that the interstate commerce act was directed against the acts of railroad companies which prevent continuity of transportation, and section 5258, R. S., was directed against the trammels of state enactments then existing or which might be attempted; and that neither statute had the purpose to relieve the railroads of any obligations to their creditors or to take from their creditors any remedial

¹ *Supra*, § 17.

² U. S. R. S. 5258, *infra*, § 42.

³ *Wall v. Norfolk & Western R. Co.*, 52 W. Va. 485, 64 L. R. A. (annot.) 501.

⁴ *Davis v. C. C. & St. L. R. R. Co.*, 217 U. S. 157, 54 L. Ed. 708 (1910).

process provided by the state. Sums due to a foreign railroad carrier from other carriers as the former's share of freight on interstate shipments were held garnishable under state laws.

§ 40. Rulings of the state courts on the commerce clause.— While the supreme court of the United States is the final arbiter of all questions in the construction and application of the federal constitution and the validity of state legislation in the exercise of the police or taxing power of the state with reference to the same, it is also true that under our dual form of government the state courts may, in the exercise of their jurisdiction, be called upon to determine such questions, and their judgment may be final as to the parties to the cause when their decision is in favor of the federal right set up in the case. Thus, if a federal right or immunity is claimed in a case in a state court, and the judgment of the highest court having jurisdiction in the state is in favor of the party making such claim of federal right, the decision of the state court thereon is final in that cause, and cannot be reviewed on writ of error by the supreme court. This is because the judiciary act of 1789 limits the appellate jurisdiction of the supreme court in reviewing decisions of the highest courts of the state to cases where the decision is against the federal right, privilege or exemption claimed. In a number of cases decisions of state courts have been rendered sustaining the claim of federal right of exemption and adjudging such statutes to be invalid, and such judgments for the reason stated, are final as to the parties to the cause.¹

¹ A number of decisions have been rendered in state courts, adjudging state statutes to be violative of the fourteenth amendment. In two notable cases in Missouri, *Russell v. Croy*, 164 Mo. 69, and *State ex rel. Johnson v. C. B. & Q. Ry. Co.*, 165 Mo. 228, amendments to the state constitution were adjudged violative of the equal protection of the laws guaranteed by the federal constitution. In *Ives v. Buffalo, etc., R. R. Co.*, 94 N. E. 432, the Work-

men's Compensation Act of New York was held to violate the due process of law guaranteed by the federal as well as state constitutions. In view of the anomaly of the state court finally determining the application of the constitution of the United States, the American Bar Association, at its meeting on August 31, 1911, recommended the amendment of the R. S. U. S., § 709 (incorporated as Sec. 237 of the new judicial code, taking effect January 1,

1912), so that the final judgment of the state court where federal claim is involved may be reviewed on writ of error by the supreme court where the claim is affirmed as well as where it is denied.

The following are some of the cases wherein state statutes have been held void by state courts as interfering with interstate commerce, these judgments being final as not reviewable by the supreme court of the United States.

Arkansas: (1908). *Railroad v. State*, 85 Ark. 284, 107 S. W. 989, the statute of the state, requiring the stoppage at a given station of a train engaged in interstate commerce, where it appears that there are sufficient trains already stopping to accomodate the public.

Colorado: (1907). *Stubbs v. People*, 40 Colo. 414. Act of Colorado prohibiting the docking of horses and the importation and the use of them as to such horses brought into the state and used therein by the owners.

Act requiring inspection before slaughtering of certain animals in so far as it provides that fresh meats cannot be shipped into the state except that the animals shall be inspected forty-eight hours before being slaughtered. *Schmidt v. People*, 18 Colo. 78 (1892).

Georgia: (1909). A statute making it unlawful if a person shall solicit a sale of liquor in any county where the sale is forbidden, where any shipment of any part of the sale was an act of interstate commerce. *Rose Co. v. State*, 133 Ga. 353 (1909). An ordinance creating a packing-house inspector whose duty it is to inspect all meats shipped into

the city or brought from outside the county, and requiring him to visit all packing-houses daily and imposing upon the importers an inspection charge while it imposes no charge on others engaged in like business. *Armour & Co. v. City Council of Augusta*, 134 Ga. 178.

Iowa: (1900). City ordinance permitting a street railroad, engaged in interstate commerce, to discriminate in rates in favor of residents of city. *State v. Omaha R. Co.*, 113 Iowa, 30 (1901). Requiring a railway company to transfer its interstate freights, passengers, etc., at a given point. *Council Bluffs v. Railway Co.*, 45 Iowa, 338 (1876).

Kansas: (1909). Where freight is received in Kansas to be transported over its own and connecting line to a point beyond the state, and the rate charged is the aggregate of the local rates of the two lines, and the connecting line had previously adopted and filed with the Interstate Commerce Commission a tariff under which its proportion of the charge on the through shipment was collected and there is a claim that the charge is excessive, the shippers redress must be through the Interstate Commerce Commission and not in a state court. *M., K. & T. Ry. Co. v. New Era Milling Co.*, 80 Kan. 141.

Kentucky: (1907). *Commonwealth v. Hay Company*, 104 S. W. 224, 31 Ky. Law Rep. 824. The laws of Kentucky requiring that a corporation carrying on business in that state shall file in the office of the secretary of state statement of the location of its office and the

name of its agent on whom process can be served as to corporations engaged in interstate commerce. *Ryan Steam Ship Line v. Commonwealth*, 30 Ky. Law Rep. 1276, 10 L. R. A. N. S. 1187, held that the laws of Kentucky, Sec. 571 (1903) providing that all corporations carrying on business in the state shall have an office and agent where services can be had making it unlawful for such corporation carrying on business without complying with the laws, in so far as it affects steamship companies engaged in interstate commerce.

Maine: (1892). Making a railway ticket binding on the railway company for six years. *La-Farler v. Railway Co.*, 84 Me. 286. Railroads to remove free of charge paupers brought into the state by it. *Bangor v. Smith*, 83 Me. 422 (1891).

Maryland: (1907). *State v. Cumberland R. Co.*, 105 Md. 478, Acts of Maryland, p. 413, amending the charter of the C. & P. R. Co., so as to prohibit it from allowing its tracks to be connected with the tracks of the B. & O. which passes through other states unless the latter shall arrange its freight charges on coal delivered to it from the former, so that the freight charges of the two companies shall not exceed a certain rate.

Massachusetts: (1906). *Commonwealth v. Caldwell*, 190 Mass. 355, act permitting the sale by peddlers of agricultural products of the United States without a license and forbidding unlicensed sales of agricultural products of other countries.

(1881). Providing for the inspection of lime imported into the state. *Higgins v. Casks of Lime*, 130 Mass. 1.

Missouri: (1907). *State v. Mo. Pac.*, 212 Mo. 218. A law regulating the hours of service of telegraph operators and train dispatchers in so far as it applies to interstate traffic.

(1909). *International Text Book Co. v. Gillespie*, 229 Mo. 397, a law requiring a foreign corporation carrying on solely interstate commerce in Missouri to make out and deliver to the secretary of the state a statement as to its property and business within the state and to pay a tax thereon.

New York: (1898). Goods made by convict labor in another state to be labeled as such when exposed for sale. *People v. Hawkens*, 157 N. Y. 1.

(1901). Providing that no stone shall be used on any municipal work except the stone was dressed or cut or carved within the state. *People v. Coler*, 166 N. Y. 144.

Ohio: (1897). Act regulating sale of convict-made goods from other states. *Arnold v. Yanders*, 56 Ohio, 417, 47 N. E. 50.

Oklahoma: (1893). Inspecting cattle driven into a state and imposing a fee therefor. *Faris v. Henderson*, 1 Okl. 384.

South Carolina: (1907). *Wenslow v. Atlantic Coast Line*, 79 S. C. 344, 60 S. E. 709, act making the carrier the agent of its connecting carrier from whom it receives freight, liable for freight lost by such connecting carrier.

(1901). Imposing a penalty of

\$500 for shipping freight other than as designated by the shipper. *Lowe v. Railway Co.*, 63 S. C. 248.

Tennessee: (1909). *Acklen v. Thompson*, 126 S. W. 730, 122 Tenn. 43, act prohibiting the sale of plumage of birds captured or killed without the state, if applied to the case where the possessor had in the course of his trade acquired title in a foreign state and brought the game into the state for use or commercial purposes.

(1896). Requiring all persons other than photographers of the state who shall solicit pictures to be enlarged outside of the state to pay tax. *State v. Scott*, 98 Tenn. 254.

Texas: (1906). *Ex parte Massy*, 49 Tex. Crim. App. 60. A statute making it a misdemeanor to solicit orders for the sale of intoxicating liquors in local option districts.

(1906). *Texas & Pacific v. Allen*, 42 Tex. 331, 98 S. W. 450, act imposing a penalty on carriers for delay in furnishing cars.

(1909). Contract made in Texas for the sale of goods to a resident corporation by a foreign corporation to be shipped from a sister state to a buyer in Texas affects interstate commerce and is not subject to Texas Anti-Trust laws. *Hardware Co. v. Pottery Co.* 120 S. W. 1088.

Utah: (1908). The law requiring a license to canvass or sell by sample certain goods to be shipped

into the state and permitting without license, canvassing or selling in such manner goods not shipped into the state, though such a sale without a license is prohibited only in case of selling to users and consumers. The mere fact that the goods had been shipped into the state being not alone conclusive that they have lost that character as articles of interstate commerce. *State v. Bayer*, 34 Utah, 257.

Vermont: (1908). In *State v. Peet*, 68 Atl. 661, 80 Vt. 449, the law of Vermont making it punishable to keep, with intent to ship out of the state for food purposes, the flesh of a calf which was less than four weeks old or weighed less than 50 pounds.

Washington: (1908). A city ordinance designating as peddlers non-residents of state taking orders in the city for groceries and imposing a penalty for doing business without a license. *State v. Glasby*, 50 Wash. 704.

West Virginia: (1906). *Jennings v. Big Sandy R. Co.*, 61 W. Va. 664, 57 S. E. 272, act imposing a forfeiture on any railroad which shall demand or receive a greater toll for compensation than is provided by the act so far as applicable to interstate commerce.

Wisconsin: (1908). *State v. C. M. & St. P. Ry. Co.*, 136 Wis. 407, a statute providing hours of service for telegraph operators, including train dispatchers.

CHAPTER III.

THE FEDERAL REGULATION OF INTERSTATE COMMERCE.

- § 41. The beginning of federal regulation.**
- 42. The railroad act of 1866.**
- 43. The state control of local business of interstate railroads.**
- 44. State regulation of railways in the United States.**
- 45. Governmental regulation of railways in England.**
- 46. The common law in interstate commerce.**
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- 53. The commerce court.**
- 54. Regulation of bridges and ferries over navigable rivers.**
- 55. Regulation of telegraph and telephone companies.**
- 56. The release of the federal regulating power.**
- 57. Regulation by the delegation of power.**
- 58. Additional acts of congress in the regulation of commerce.**
- 59. The Department of Labor and Commerce.**

§ 41 (39). The beginning of federal regulation.—Although the recognized necessity for the national control of interstate commerce was the immediate occasion and moving purpose in the adoption of the constitution and the formation of the federal union, and the broad and comprehensive construction of the commerce clause by the supreme court under chief justice Marshall has laid the foundation of all subsequent decisions, the direct federal regulation of such commerce, at least as to land transportation, did not begin until the close of the first century of the republic's existence. The far-reaching importance of national control over interstate as well as over foreign commerce was not and could not be foreseen at the time of the adoption of the constitution. It was not until twenty years after the close of the civil war that changed economic conditions of the country made intolerable the discriminating legislation of the states and led to the judicial

declaration by the supreme court in 1886,¹ that in the matter of interstate commerce the United States were but one country and are and must be subject to but one system of regulations, and not to a multitude of systems. Soon after this, in 1888 and in 1890,² the court extended the same principle of the freedom of interstate commerce to the police power of the states in the liquor traffic decisions. In 1886 it was also definitely decided,³ that the state power of regulation of railway traffic did not and could not extend to interstate traffic in any form, and that such shipments were national in their character, and their regulation confined to congress exclusively. Thus it was for the first time decided that this right of interstate commerce was so essentially national in its character that the inaction of congress was equivalent to its determination that the commerce must be free, and that therefore any state regulation of the right to carry on such commerce was inoperative and void. The principle of concurrent state powers during the inaction of congress and the invalidation of state action by reason, not of the existence, but of the exercise of the federal power had no application to the regulation of the right to carry on commerce between the states.

Thus the close of the first one hundred years of the government was marked by the distinct judicial declaration of the freedom of interstate commerce from any control or regulation by the states, either by police or taxing power, and the way was logically opened for the direct exercise by congress of the power of regulation conferred by the constitution.

§ 42 (40). The railroad act of 1866.—Although congress had frequently legislated on the subject of water transportation (*supra*, § 13), its first legislation in regard to railroad transportation, other than the incorporation of the land grant and government aided Pacific railroads in 1862, was the act of June 15, 1866, since incorporated in the revised statutes as section 5258. This act was entitled in its preamble,

“Whereas the constitution of the United States confers upon congress in express terms, the power to regulate commerce

¹ Robbins v. Shelby County Taxing District, *supra*.

³ Wabash, St. L. & P. R. Co. v. Illinois, *supra*.

² Bowman v. Railway Co., *supra*;
Leisy v. Hardin, *supra*.

among the several states, to establish post-roads, and to raise and support armies,"

and it provided as follows:

"Every railroad company in the United States, whose road is operated by steam, its successors and assigns, is hereby authorized to carry upon and over its road, boats, bridges and ferries, all passengers, troops, government supplies, mails, freight and property on their way from any state to another state, and to receive compensation therefor, and to connect with roads of other states, so as to form continuous lines for the transportation of the same to the place of destination. . . .

"This section shall not be construed to authorize any railroad company to build any new road, or any connection with another road, without authority from the state in which such railroad or connection shall be proposed."

The purpose of this act, as declared by the supreme court, was to remove trammels upon transportation which had previously existed, and to prevent the creation of such trammels in the future,¹ and also to be a declaration by congress in favor of the great policy of continuous lines, and therefore as favoring such business arrangements between companies as would make such connections effective,² and as indicating an intent that interstate commercial intercourse should be free.³

The statute however imposes no duties upon carriers so as to compel through routing of interstate traffic, and merely permits or authorizes the carriage of freight or traffic from one state to another and the formation of continuous lines by mutual agreement.⁴ The act was only intended to remove trammels upon transportation between different states imposed by state enactments or the then existing laws of congress, and did not prevent the operation of police laws of the states affecting interstate railways.⁵

This statute has been invoked in a number of cases, wherein

¹ Railroad Co. v. Richmond, 19 Wall. 584 (1873), 22 L. Ed. 173.

² Union Pacific R. Co. v. Chicago, etc., R. Co., 163 U. S. 564 (1896), 41 L. Ed. 265, 274, where the court said: "It is impossible for us to ignore the great public policy in favor of continuous lines thus declared by congress and that it is an effectuation of such policy that

such business arrangements as will make such connections effective, are made."

³ Bowman v. C. & N. W. R. R., 125 U. S. 465 (1888), 31 L. Ed. 700.

⁴ Kentucky & Indiana Bridge Co. v. L. & N. R. Co., 37 Fed. Rep. 567, l. c. p. 633 (1889).

⁵ R. R. Co. v. Fuller, 17 Wall. 560 (1873), 21 L. Ed. 710.

the validity of state legislation affecting interstate railways was involved; and it has been uniformly held by the supreme court that the statute was not intended to interfere with the authority of the states to enact such regulations with respect at least to a railroad corporation of its own creation, as were not directed against interstate commerce, but which only incidentally or remotely affected such commerce, and were not in themselves regulations of interstate commerce, but were designed reasonably to subserve the convenience of the public.¹ Thus, the statute did not interfere with state enactments, as the running of trains on Sunday,² or excluding diseased cattle.³ Neither did this declaration of the national policy, favoring continuous transportation, exempt railroad cars employed in interstate transportation from the attachment laws of the states, nor the railroad companies from the process of garnishment therein.⁴

§ 43. State control of local business and incorporation of interstate railroads.—Though this statutory declaration of national policy in 1866 was not directly involved, the principle is applicable to recent decisions of the supreme court holding invalid the attempted state revocation of the license of interstate railroads and telegraph companies to do a local business in the state, notwithstanding the admitted state control over the admission of foreign corporations engaged in general business and its attempted control over the local business of interstate railroads and telegraph companies. Thus a statute of Missouri forfeiting the right of a railroad company to do a local business in the state, when under the sanction of the state it had come into the state and acquired a large amount of property therein, in case it should bring a suit in the federal court or remove from the state to the federal courts, was held void.⁵

The statute of Kansas was also held void which exacted from

¹ *Lake Shore & M. S. Ry. Co. v. Ohio*, 173 U. S. 285, 43 L. Ed. 702 (1899).

² *Hennington v. Georgia*, *supra*.

³ *M. K. & T. R. Co. v. Haber*, 169 U. S. 613 (1898), 42 L. Ed. 878.

⁴ See *supra*, § 39.

⁵ *Herndon v. C. P. I. & P. Ry. Co.*, 218 U. S. p. 135; 54 L. Ed. p. 970 (1910), affirming 157 Fed. 783 (1910).

a foreign telegraph company a charter fee of a given per cent of the entire authorized capital stock of the company as a condition of continuing to do local business in the state.¹

Both these cases involved the right of corporations in the state, which had made investments therein, for the purpose of doing both an interstate and local business. A broader question of the right of the state to prevent an interstate railroad or telegraph company of another state from entering the state, or to require reincorporation as a state corporation as a condition of entering the state, was not decided. It would seem however that the right of an interstate railroad or other interstate company to do a local business under reasonable state regulation is an incident of the right to transact an interstate business, and that congress is the only authority which can prescribe the limitation of the right of a corporation directly engaged as an instrumentality of interstate commerce to enter a state.

§ 44 (41). State regulation of railways in the United States. With this judicial declaration of the freedom of interstate commerce from state control also came the distinct judicial recognition of the governmental power of regulation over public carriers. This principle had been already established both in the states of this country and in England.

Thus in this country prior to the adoption of the interstate commerce act railway commissions had been established in several states, some with powers of regulation, and others only with powers of investigation and recommendation. It was established in the Granger cases,² that railroad companies were carriers for hire and as such were engaged in the public employment affecting the public interests and were subject to legislative control as to their rates of fare and freight, unless protected by their own charters therefrom. As carriers they must carry when called upon to do so, and can charge only a reasonable sum for the carriage. The principle was

¹ *Western Union Telegraph Co. v. Kansas ex rel.*, 216 U. S. 1, 54 L. Ed. 355, reversing 75 Kan. 609 (1910). (1876), 24 L. Ed. 77; *Railroad Co. v. Iowa*, 94 U. S. 155 (1876), 24 L. Ed. 94; *Peik v. Railway Co.*, 94 U. S. 164 (1876), 24 L. Ed. 97.

² *Munn v. Illinois*, 94 U. S. 113

also distinctly declared that when property had been clothed with a public interest, the legislature may fix a limit to that which in law shall be reasonable for its use, and that this limit binds the courts as well as the people. It was urged in these cases that the statutes of the states regulating rates amounted to a regulation of commerce among the states; but it was held that where the railroad was employed in state as well as in interstate commerce, and until congress acted, the state must be permitted to establish such rules and regulations as may be necessary for the promotion of the general welfare of the people within its own jurisdiction, even though in doing so those without may be indirectly affected.

While there has been some difference of judicial opinion as to what classes of business were affected with a public use so as to warrant state regulation of charges, there has been no such difference as to the application of the principle to common carriers, and their subjection to public regulation has been uniformly conceded.¹

§ 45 (42). Governmental regulation of railways in England. The principle of governmental regulation of railways was adopted in England soon after the first introduction of railways in that country. Thus, the Railways Clauses Consolidation Act of 1845, in granting the power to vary tolls upon railways so as to accommodate them to the circumstances of the traffic, provided that tolls should be at all times charged equally to all persons, and that the power of varying should not be used for the purpose of prejudicing or favoring particular parties, or for the purpose of collusively or unfairly creating a monopoly either in the hands of the company or of particular parties. The Railway and Canal Traffic Act of 1854² specifically provided that the railway company should make arrangements for receiving and forwarding freight, and prohibiting any undue or unreasonable preference or advantage, using substantially the language adopted in the third section

¹ *Budd v. New York*, 143 U. S. (1901); *Minneapolis & St. Louis R. Co. v. Minnesota*, 136 U. S. 257 (1892), 36 L. Ed. 247; *Brass v. North Dakota*, 153 U. S. 391 (1894), 38 L. Ed. 757; *State ex rel. v. Associated Press*, 159 Mo. 410 (1902), 46 L. Ed. 1151.

² 17 and 18 Vic., c. 31.

of the Interstate Commerce Act, and authorized summary proceedings in the courts for the enforcement of its provisions. The act of 1863¹ provided for securing equality of treatment where the railway company operates its steam vessels; and finally the Regulation of Railways Act of 1873² authorized the appointment of not more than three commissioners, one of whom should be experienced in the law and one of experience in the railway business, and not more than two assistant commissioners, and this commission was granted very comprehensive powers, including the power of making through routes and apportioning through rates thereon. As will be hereafter seen some of the provisions of the Interstate Commerce Act are based upon the English statutes, and the English decisions construing those statutes have been frequently cited in the federal courts.³ English precedents however in the matter of public regulation of railways are of limited value in this country, in view of the vast difference in the conditions of railroad service. In the one there is compact population in a limited area; in the other a great continent, with immense tracts of sparsely settled and newly opened territory, covered with a great network of railroads and with numerous competing communities.

§ 46 (43). **The common law in interstate commerce.**—There is no federal common law in the sense of a national customary law distinct from the common law of England, such as the common law adopted by the several states, each for itself, applied to its local law and subject to such alterations as may be provided by its own statutes.⁴ There are therefore no crimes of the United States, and no pains and penalties are enforced by its courts, except as enacted in the statutes of the United States.

Under section 721 of the Judiciary Act the laws of the several states are enforced in the courts of the United States.⁵

¹ 31 and 32 Vic., c. 119.

² 36 and 37 Vic., c. 48.

³ *Infra*, Interstate Commerce Act, secs. 2 and 3.

⁴ *Wheaton v. Peters*, 8 Pet. l. c. 658, 8 L. Ed. 1079 (1834); *Smith v. Alabama*, 124 U. S. 465 (1888), 31 L. Ed. 508.

⁵ "Sec. 721. *Laws of the states; rules of decision.* The laws of the several states, except where the constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the

In this section, by the "laws of the states" is meant the statute laws of the states as construed by the local tribunals, and not the rules of law declared by the decisions of the states in matters of general jurisprudence.¹ The federal courts are not bound to follow the rulings of the state courts on questions of general commercial law or of equity jurisprudence, but they declare their own views of the law, irrespective of the courts of the state,² and the same ruling has been made as to the legal principles controlling the liability of railroad companies to employes.

There was no federal statutory regulation of interstate commerce prior to the enactment of the interstate commerce law in 1887. It was ruled in some of the circuit courts, that in the absence of a distinct federal common law or statute, there was no law prior to 1887 controlling the regulations of carriers and shippers in interstate commerce and warranting a recovery on account of discriminating charges therein, and that this was a matter of exclusive federal jurisdiction, which was not exercised prior to the enactment of the Interstate Commerce Act.³ It was therefore held that the state courts had no jurisdiction in such cases, and as the courts of the United States in removed cases had no wider jurisdiction than the courts from which they were removed, the federal courts had no jurisdiction therein.

This question of the common law in interstate commerce was presented to the supreme court in 1901 in a case from Nebraska,⁴ where the supreme court of that state had sustained a recovery against an interstate telegraph company, for alleged discrimination in charges. The company claimed that as there was no federal regulation of interstate telegraph

United States, in cases where they apply." (Act Sept. 24, 1789, c. 20, § 34, 1 Stat. 92.)

¹ Railroad Co. v. Baugh, 149 U. S. 368 (1893), 37 L. Ed. 772.

² Swift v. Tyson, 16 Pet. 1 and 18 (1842), 10 L. Ed. 865, 871; Oates v. Bank, 100 U. S. 239 (1879), 25 L. Ed. 580; Railroad Co. v. National Bank, 102 U. S. 14 (1880), 26 L. Ed. 61.

³ Swift v. Railroad Co., 58 Fed. Rep. 858; Sheldon v. Railroad Co., 105 Fed. Rep. 785. See *contra*, Murry v. Railroad Co., 62 Fed. Rep. 24, 35 C. C. A. 62 (1899), 92 Fed. Rep. 868; Adams, J., in Kinavey v. Terminal Association, 81 Fed. 802.

⁴ Western Union Tel. Co. v. Call Pub. Co., 181 U. S. 92 (1901), 45 L. Ed. 765.

rates, there could be no recovery, as there was no controlling statute or common law for such recovery. The supreme court however sustained the recovery, holding that there was a common law in force generally throughout the United States, and that the countless multitude of interstate commercial transactions were subject to the rules of common law except so far as they were modified by congressional enactment. The jurisdiction of the state court to enforce these principles of the common law in interstate commercial transactions was therefore sustained.

The court in its opinion in these cases refers approvingly to an opinion of Judge Shiras in the Iowa circuit,¹ where the subject had been exhaustively discussed in a suit for damages against a railroad carrier on account of alleged discrimination in interstate shipments prior to the enactment of the Interstate Commerce Act. This case had been filed in the state court and removed to the United States circuit court, and it was held that the state court had jurisdiction of the subject-matter, and therefore the United States court had jurisdiction over the removed case, as congress had not declared any exclusive jurisdiction in such cases for the federal courts.

Under the law as declared in these cases, the principles of the common law were enforced as to matters of national control as well as to matters of state control, and in this sense there is a common law of the United States controlling the relations of interstate carriers and the public, and the enactments of congress in the regulation of those relations are to be construed in the light of the principles of the common law.

This applies to interstate commerce on land. Interstate commerce carried on by water, whether on the seas or on the inland navigable waters of the United States, is subject to the rules of the maritime law where applicable.

§ 47 (44). Federal and state courts in the federal regulation of interstate commerce.—Under the constitution of the United States the judicial power of the United States is extended to cases arising under the constitution and laws of the United States, and this jurisdiction may be made exclusive in the federal courts by congress either by express enactment or by

¹ *Murray v. Railroad Co., supra.*

necessary implication therein.¹ It was at one time questioned whether the state courts could exercise concurrent jurisdiction with the federal courts in cases arising under the constitution, laws and treaties of the United States; but it was said by the supreme court in the case cited that the laws of the United States were laws in the several states, and just as much binding therein on the citizens and courts thereof as were the laws of the states. Rights, whether legal or equitable, acquired under the laws of the United States may be prosecuted in the courts of the United States, or in the state courts competent to decide questions of like character and class, subject however to the qualification that when a right arises under a law of the United States, congress may give to the courts of the United States exclusive jurisdiction.²

Under the act of 1887,³ the circuit courts of the United States were given original cognizance, concurrent with the courts of the several states, of all suits of a civil nature in common law or equity, not only in cases of diverse citizenship, but also in cases arising under the constitution and laws of the United States, or treaties made, or which shall be made, under their authority. This is subject to the reservation of the exclusive jurisdiction of the United States courts under section 711, R. S. U. S.,⁴ in criminal, patent, admiralty cases, and suits for penalties and forfeitures under the laws of the United States. Not only such suits brought to enforce the provisions of specific acts of congress, but also all suits based upon and asserting federal rights in interstate commerce, are suits arising under the constitution and laws of the United States, and the circuit courts of the United States have jurisdiction thereof irrespective of diverse citizenship. The supreme court held in an application for habeas corpus by a party committed for contempt for violating an injunction granted to an interstate railroad to prevent interference with its interstate traffic, that the circuit court had jurisdiction irrespective of citizenship, and that a case arose under the constitution and laws of the United States, whenever the plaintiff sets up a right

¹ *Claffin v. Houseman*, 93 U. S. 130 (1876), 23 L. Ed. 833.

² See Mr. Hamilton in 82d Federalist.

³ See Act of March 3, 1887, and August 13, 1888, 1 Compiled Stats. 508.

⁴ Compiled Statutes, p. 577.

to which he is entitled under such laws, and the correct decision of the case depends upon the construction of such laws¹

In suits brought for the enforcement of rights in interstate commerce and not for the specific enforcement of the provisions of the Interstate Commerce Act or the Anti-Trust Act, the state courts have concurrent jurisdiction with the federal courts, and such suits may be brought in the United States circuit courts irrespective of citizenship² if there is the jurisdictional amount in controversy \$2,000.00 (\$3,000.00 after Jan. 1, 1912 under the new judicial code). The fact that interstate commerce is beyond state legislative control does not *ipso facto* prevent the courts of the state from exercising jurisdiction over cases growing out of that commerce,³ but the state jurisdiction is excluded, if congress has made exclusive the jurisdiction of the federal courts.

Both in the Interstate Commerce Act and the Anti-Trust Act of 1890 there is an express vesting of jurisdiction in the United States courts of suits brought to enforce the provisions of the act. As to such suits brought to enforce the provisions of the Interstate Commerce Act, it has been held, both in the federal and in the state courts, that the jurisdiction is exclusive in the United States courts.⁴ The same ruling would doubtless be made as to suits brought to enforce the Anti-Trust Act of 1890.⁵

A suit arises under the constitution and laws of the United States only when the plaintiff's statement of his own cause of

¹ In re Lennon, 166 U. S. 548, L. c. 553, 41 L. Ed. 1110.

² See section 8 of Interstate Commerce Act, *infra*.

³ Murray v. Chicago & N. W. R. Co., 62 Fed. Rep. 25, l. c. 43.

⁴ See sections 8 and 9 of Interstate Commerce Act, *infra*; Van Patten v. Railroad Co., 74 Fed. 981; Swift v. Railroad Co., 58 Fed. Rep. 858; Edmunds v. Ill. Central R. R. Co., 80 Fed. Rep. 79; Sheldon v. Wabash Ry. Co., 105 Fed. Rep. 785; Ordway v. Central Nat. Bank, 47 Md. 243; Copp v. Railway Co., 43 La. Ann. 511, 12 L. R. A.

725; Charles v. Mo. Pac. R. R. Co., 168 Mo. 52; Gulf, C. & S. F. R. R. Co. v. Moore (Texas), 83 S. W. Rep. 362. In the Abilene Cotton Oil Co. and Cisco Oil Mill cases the supreme court reversed the judgments in the state courts for alleged excessive charges in interstate rates on the ground that relief should have been sought before the Interstate Commerce Commission. See § 9 Interstate Commerce Act, *infra*.

⁵ See sections 4 and 7 of the act of 1890, *infra*.

action shows that it was based thereon. It is not enough that the defendant may find in the constitution or laws of the United States some grounds of defense. It is also settled that no cause can be removed from the state court to the circuit court of the United States unless it could have been originally brought in the latter court.¹

§ 48. Federal causes of action in the state courts.—As the laws enacted by congress in its regulation of interstate commerce are the laws in the several states, rights created thereby may be enforced in the state courts in the absence of exclusive legislation vested in congress; and the judgments of the state courts in the enforcement of said rights are subject to review by the supreme court when a federal right, duly asserted, is denied through the appellate jurisdiction of the supreme court over the state courts under the Judiciary Act. Thus, the judgment of the supreme court of Pennsylvania, in non-suiting a plaintiff in an action for personal injuries, was reversed by the supreme court of the United States because, in holding plaintiff barred by contributory negligence, it had failed to give effect to the provision of the Federal Safety Appliance Act and the rule of non-assumption of risk therein declared.²

Under the amendment of the Interstate Commerce Act of 1910 the right to sue in the state courts is specifically given in actions of reparation³ and in the 1910 amendment of the Employer's Liability Act suits in state courts under the act are not subject to removal to the federal court.

The right of the state courts to exercise this jurisdiction may not carry with it in all cases the duty to exercise it. Thus, the procedure of the state court may not be suited to the enforcement of the right in the form congress directs; and the rela-

¹ In *re Winn*, 213 U. S. 458, 53 L. Ed. 873 (1909). As to appellate jurisdiction, where the jurisdiction of a circuit court attaches both on the ground of diverse citizenship and also on the separate federal ground, see *Mississippi Railroad Commission v. Ill. Cent. R. R. Co.*, 203 U. S. 335, 51 L. Ed. 209 (1906).

² *Schlemmer v. R. R.*, 205 U. S. 1; 51 L. Ed. 681 (1907), four judges dissenting, reversing 207 Pa. 198. See same case on second suit of error 220 U. S. 590, 55 L. Ed. — (1911), affirming 222 Pa. 470.

³ See § 16 of Act, *infra*.

tion of master and employe as established and enforced in the courts of the state under the laws of the state may be different from that enjoined by congress, and confusion and embarrassment may result from the enforcement of both in the same tribunals. In a recent case the supreme court of Connecticut declined to assume jurisdiction in a suit under the Employer's Liability Act of 1908 prior to its amendment of the act of 1910 *supra*, both on the ground that congress did not intend to confer such jurisdiction on the state court, and on the further ground that if it did so intend the state court, in the absence of state legislation, was not bound to assume it.¹ As to this latter ground, however, whatever the embarrassment in exercising jurisdiction owing to statutory forms of procedure, a state court in the enforcement of a right created by federal law is controlled by the provision of the constitution of the United States, that this constitution and the laws of the United States which should be made in pursuance thereof * * * shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitutional laws of any state to the contrary notwithstanding.²

In invoking the federal jurisdiction for the assertion of a federal right by a private litigant, the amount of \$2,000.00 (\$3,000.00 after July 1, 1912) must be involved in the controversy.

§ 49 (45). Genesis of the Interstate Commerce Act.—The recognition of the governmental power in controlling interstate commerce immediately preceded the judicial declaration that interstate railway transportation was beyond state control. The question of interference with interstate commerce had been raised in the Granger cases, and the supreme court had held³ that the act regulating fares was valid in the absence of regulation by congress, and that until congress undertook to legislate for those who were without the state, the state could provide for those within, even though those without might be indirectly affected.

¹ *Hoxsie v. N. Y. & N. H. H. R. Co.*, 82 Conn. 352 (1909). See *infra*, § 530.

² Constitution, Art. VI., par. 2.
³ *Pike v. Chicago, etc., R. Co.*, 94 U. S. 1. c. 177 (1876), 24 L. Ed. 98.

The supreme court of Illinois¹ cited these cases in sustaining a state statute as to so much of interstate transportation as was within the limits of the state of Illinois. But the supreme court in the same case (*supra*, § 37), said that in the Granger cases the importance of the question of the governmental power of regulation and of the company's contract right of exemption therefrom overshadowed all others, so that the question of freedom of interstate commerce received but little attention at the hands of the court. This decision of the supreme court reversing the supreme court of Illinois, was rendered in 1886, in the same year that the freedom of interstate commerce from the state taxing power was declared in the Tennessee drummer case, and broadly affirmed that the statute of a state enacted to regulate and tax, or to impose any other restriction upon the transmission of persons or property or telegraph messages from one state to another, was not within the class of legislation which the state, in the absence of legislation by congress, could enact, and that the state statute was void as to all interstate shipments, including that part of the transmission of such shipments which was within the state.

§ 50 (46). **Passage of the Interstate Commerce Act.**—The decision in the Wabash case demonstrated the lack of power in the states to regulate interstate shipments,² and the demand for the exercise of this power by congress becoming irresistible, the interstate commerce bill which had been pending for several years in congress became a law February 4, 1887.³

The discussion in the two houses of congress and in the public press was mainly directed to the long and short haul clause contained in the fourth section, and the prohibition of pooling contained in the fifth section of the act. Differences of opinion developed between the house and the senate, the former insisting on the prohibition of pooling and on a qualified long and short haul clause. The bill was finally enacted in the form reported by the conference committee of the two houses of

¹ Wabash, St. L. & P. R. Co. v. Illinois, 104 Ill. 476.

² This case was decided October 25, 1886.

³ The interstate commerce com-

mission was established March 22, 1887, but the terms of the commissioners were computed from January 1st. See 19 Opinion of Attorney Generals, p. 47, 1887.

congress. Frequent references were made in the debates to the then recent decision of the supreme court in the Wabash case denying to the states any power for the regulation of interstate traffic. A very wide difference of opinion was developed in the discussion as to the proper construction of the act, particularly as to what were the "substantially similar circumstances and conditions" in the fourth section, and one of the members of the house in the final debate described the bill as "one which nobody understands, nobody wants, and everybody is going to vote for."¹

§ 51. The successive amendments of the Interstate Commerce Act.—The act to regulate commerce was so clearly within the power of congress that no serious question was raised as to its constitutionality. Very grave questions however were

¹ For a comprehensive and accurate statement of the condition of the state regulation of railroads at and prior to the adoption of the interstate commerce act, see Hadley's "Railroad Transportation, its History and its Laws," first published in 1885. See also report of Windom to U. S. Senate, 1874, (Senate Report No. 307, 43rd Congress, 1st Session). Cullom Report (Senate Report No. 46, 49th Congress, 1st Session). Hepburn Report, New York legislature of 1879.

In the Import Rate Case, 162 U. S. 211, 40 L. Ed. 944, the supreme court in referring to the causes for the enactment said:

"They chiefly grew out of the use of railroads as the principal modern instrumentalities of commerce. While shippers of merchandise were under no legal necessity to use railroads, practically they were. . . . From the very nature of the case, therefore, railroads were monopolies, and the

evils that usually accompany monopolies soon began to show themselves, and were the cause of loud complaints. The companies owning the railroads were charged, and sometimes truthfully, with making unjust discriminations between shippers and localities, with making secret agreements with some to the detriment of other patrons, and with making pools or combinations with each other, leading to oppression of entire communities. . . . As the powers of states were restricted to their own territories and did not enable them efficiently to control the management of great corporations whose roads extend throughout the entire country, there was a general demand that congress, in the exercise of its plenary power over the subject of foreign and interstate commerce, should deal with the evils complained of by a general enactment, and the statute in question was the result."

made as to what powers were conferred upon the commission by the terms of the act and as to the construction of the different sections of the act in relation thereto, and the discussion and determination of these questions led to continuous agitation for amendments to the act. Thus, it will be seen under the different sections of the act (*infra*, part II), the powers of the commission were construed by the supreme court to be materially different from the powers claimed and exercised by the commission during the first years of its existence.

Thus it was held that the commission under the act as originally framed had no power to make maximum and minimum rates for the future,¹ and that the competition between the carriers created substantially different circumstances and conditions within the meaning of section 4, known as the long and short haul clause.²

Amendatory acts have been passed by congress in 1889, 1893, 1903, 1906, 1908 and 1910. That of 1889 gave the shipper an additional summary and effective remedy by writ of mandamus to compel the carrier to furnish equal facilities (*infra*, § 419);³ that of 1893 remedied the defect growing out of the difficulty to enforce self-incriminating testimony (*infra*, § 343); the act of 1903, known as the Elkins Law, made very important changes, materially enforced the provisions against discriminations, in that it made the public rates conclusive against the carrier, every deviation therefrom being punishable. The

¹ Social Circle Case, 162 U. S. 184, 40 L. Ed. 935 (1895). In this case the court quoted from the opinion of Justice Jackson in the circuit court (43 Fed. 47) as to the scope of the act, as follows:

"Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at the common law, free to make special contracts looking

to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound, and adopted in other trades and pursuits." Cincinnati Freight Bureau case, 167 U. S. 479, 42 L. Ed. 243 (1896).

² Import Rate case, 162 U. S. 197, 40 L. Ed. 940 (1895).

³ See B. & O. R. R. v. U. S. ex rel., 215 U. S. 481, 54 L. Ed. 292 (1910).

scope of the act was also materially extended as to the parties subject to its provisions. Fine was substituted for imprisonment in the penal provisions of the act (*infra*, § 422). In 1903 was also enacted the so-called Expedition Act (*infra*, § 490) which materially expedited the procedure in suits brought by the United States or suits prosecuted by the attorney-general in the name of the Interstate Commerce Commission.

The most important amendments were those of 1906 and 1910. The act of 1906, known as the Hepburn Act,¹ not only

¹ The Hepburn or Rate Bill of 1906 became a law on June 29, 1906, and, under joint resolution, took effect sixty days after its approval, that is, on August 28, 1906. A bill embodying many of the same features, known as the Elch-Townsend Bill, had been passed in the House of Representatives in the Fifty-eighth Congress, but did not come to a vote in the senate. Very exhaustive hearings were had by the Interstate Commerce Committees in both the house and senate, containing the testimony of railroad officials, shippers, economists, and members of the Interstate Commerce Commission, representing all shades of opinion. The discussions in congress, especially in the senate, related mainly to the increased powers given to the commission and the judicial review provided in the act.

In the course of the senate hearing, Attorney-General Moody, at the request of the committee, rendered an opinion May 5, 1905 (Vol. II of Senate Reports, p. 1674), embodying the following conclusions:

"1. There is a governmental power to fix the maximum future

charges of carriers by railroad, vested in the legislatures of the states with regard to transportation exclusively within the states, and vested in congress with regard to all other transportation.

"2. Although legislative power, properly speaking, cannot be delegated, the law-making body, having enacted into law the standard of charges which shall control, may intrust to an administrative body not exercising in the true sense judicial power, the duty to fix rates in conformity with that standard.

"3. The rate-making power is not a judicial function and cannot be conferred constitutionally upon the courts of the United States, either by way of original or appellate jurisdiction.

"4. The courts, however, have the power to investigate any rate or rates fixed by legislative authority and to determine whether they are such as would be confiscatory of the property of the carrier, and if they are judicially found to be confiscatory in their effect, to restrain their enforcement.

"5. Any law which attempts to deprive the courts of this power is unconstitutional."

broadened the scope of the act by the inclusion of pipe lines, express companies and sleeping car companies and all the instrumentalities and facilities of shipment or carriage, with the prohibition of free passes and the so-called commodity clause, seeking to prohibit the carrier from transporting its own commodities, compelling such connections, restoring the punishment of imprisonment, authorizing the commission to establish through routes, imposing liability upon the initial carrier for damage on a through shipment and most important of all authorizing the commission in determining that any rate was unreasonable to also determine and prescribe the just and reasonable rate or rates to be thereafter charged as the maximum to be charged, and what regulation in respect to the transportation is just, fair and reasonable to be thereafter followed, the limit of two years being fixed for the time wherein any order should be in force.

Another important amendment in this act of 1906, was a very substantial enlargement of the powers of the commission in the requirement of annual reports from the carriers showing the details of their financial operations, authorizing the commission in its discretion to describe the forms of the accounts and records to be kept by the carrier, making it unlawful for them to keep any other accounts than those prescribed by the commission, and further authorizing the commission to employ special agents or commissioners for the inspection of any and all accounts carried.¹

He also advised that reasonable rates determined by the legislative authority would not constitute a preference between the ports of different states within the prohibition of article I, section 9, paragraph 6, of the Constitution, even though they resulted in a varying charge per ton per mile to and from the ports of the different states.

¹ For the action of the commission in the enforcement of this provision with the co-operation of the state commission, see *infra*, § 409. It was recommended by Pres-

idents Roosevelt and Taft in their messages to congress and strongly urged in the discussions of the amendments of 1906 and 1910, that the prohibition of pooling in section 5 of the Interstate Commerce Act should be modified and railroads exempted from the restraints of the Anti-trust Act, so as to permit conferences and agreements of carriers as to rates under the regulating supervision of the Interstate Commerce Commission. This was advocated on the ground that unregulated competition regarding rate wars was detrimental to the

The commission in its report in 1907 said of the amendment of 1906 "Substantive provisions of the original act prohibiting the exaction of unreasonable charges and prohibiting discrimination between persons and places were unchanged by the legislation of 1906. The main purpose of that legislation was to provide more adequate means for the enforcement of rights and duties declared to exist."

The act of June 18, 1910 (36 Stats. L. 539), commonly known as the Mann-Elkins Law, in the language of the commission (24th Annual Report, 1910) "enlarged the substantive provisions of the act to regulate commerce, corrected numerous defects, which experience had disclosed, conferred upon the public new rights and remedies and correspondingly increased the jurisdiction and authority of the commission."

The most important feature of the act of 1910 was the authorization of the commission to investigate any new schedule of rates or single rate proposed by a carrier and pending such investigation, to suspend the taking effect of such schedule or rate, for a period not exceeding one hundred twenty days.

§ 52. The enlarged powers and jurisdiction of the Interstate Commerce Commission.—While the substantive provisions of the act to regulate commerce, that is, the requirement that charges should be reasonable and the prohibition of unjust discriminations or undue preferences or disadvantages to persons or traffic similarly circumstanced have remained unchanged since their first enactment, very great changes have been made by these successive amendments as to the scope of the act, the parties subject thereto and in what may be termed its "adjective" provisions, making effective these fundamental requirements and provisions of the act, and these successive amendments have added very materially to the powers and responsibility of the Interstate Commerce Commission.¹

public as well as to the railroads and that the public good required not only reasonableness but stability in railroad rates. This view has not as yet prevailed in legislation.

mission has been increased from five members in the original act with terms of six years and salaries of \$7,500 to seven commissioners with terms of seven years and salaries of \$10,000. *Infra*,

¹ The membership of the com- § 399.

Not only have the powers of the commission been directly enlarged in their inquisitorial authority in the requirement of reports from the railroads, in the employment of examiners in making investigations, and in compelling the attendance of witnesses in the production of testimony, as will be seen from the detailed construction of these statutory provisions, but there is also through the judicial construction of the statute, by the recent decisions of the supreme court, a very great increase of the jurisdiction and responsibility of the commission. Thus, the privilege to a party claiming to be damaged, given by section 9 of the act, either to make complaint to the commission or to bring suit for the recovery of the damages in a district or circuit court, has been construed so that this right of election does not exist in any case where the wrong involves violation of the act, which is subject to the jurisdiction of the commission, and any such case must therefore be redressed by the commission before any action can be brought in court.¹

The same principle has been applied by the supreme court to the specific remedy of mandamus authorized by section 23 of the act for the enforcement of duties of the carrier; and the right to this remedy is construed with the other provisions of the act and practically with the enlarged powers of the commission under the amendment of 1906, so as to be very materially abridged.²

The comprehensive power of the commission to investigate and determine the reasonableness of rates, extends to cases

¹ T. & P. R. R. Co. v. Abilene Cotton Oil Co., 204 U. S. 449, 51 L. Ed. 562 (1907).

² B. & O. R. R. Co. v. U. S. ex rel., 215 U. S. 481, 54 L. Ed. 292 (1910). It was said in this case that the decision in Southern R. R. Co. v. Tift, 206 U. S. 428, 51 L. Ed. 1124, (1907), did not qualify the ruling in the Abilene Oil case and did not support the right to resort to the courts in advance of action by the commission for relief against unreasonable rates or unjust discriminatory practices which from their nature primarily

require action by the commission. In the Tift case the court, affirming 138 Fed. 753, held that a circuit court which had suspended proceedings on a bill seeking relief from an advance in freight rates pending action by the commission could grant relief under section 16 of the Interstate Commerce Act after the commission had acted, where defendants had stipulated in open court that in case complainants prevailed decree of restitution might be made. See *infra*, Part II, sec. 9 and sec. 23 of Interstate Commerce Act.

where the existing rates are dependent upon certain basing points established by the railroads, and so-called zones of traffic are dependent thereon; and the commission may determine that the rates are unreasonable, although the reduction may involve a change in such basing points. Thus, a reduction in that part of the through rates on Atlantic seaboard shipments to Missouri river cities which applied to the haul between the Mississippi and Missouri rivers, was held not beyond the power of the commission where the commission by its order, intended only to correct through rates; which it had found upon complaint were unreasonable in themselves, by substituting therefor reasonable rates, and that the findings of the commission that certain through rates were unreasonable in themselves carried with them a presumption of correctness in so ruling.¹ But while the court in determining whether an administrative order of the commission should be suspended or set aside will consider whether the order was within the commission's lawful jurisdiction, and not whether the administrative power has been wisely exercised,² on the other hand, where the power of the

¹ Interstate Commerce Commission v. Chicago, R. I. & P. R. Co., 218 U. S. 88, 54 L. Ed. 946 (1910), reversing 171 Fed. 680.

² Interstate Commerce Commission v. Illinois Central R. R. Co., 215 U. S. 452, 54 L. Ed. 281 (1910), reversing 173 Fed. 930, where the court said: "Beyond controversy, in determining whether an order of the commission shall be suspended or set aside, we must consider (a) all relevant questions of constitutional power or right; (b) all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to have been made; and (c) a proposition which we state independently, although in its essence it may be contained in the previous one, viz., whether, even although the order

be in form within the delegated power, nevertheless it must be treated as not embraced therein, because the exertion of authority which is questioned has been manifested in such an unreasonable manner as to cause it, in truth, to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. Postal Teleg. Cable Co. v. Adams, 155 U. S. 688, 698, 39 L. Ed. 311, 316, 5 Inter. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360. Plain as it is that the powers just stated are of the essence of judicial authority, and which, therefore, may not be curtailed, and whose discharge may not be by us in a proper case avoided, it is equally plain that such perennial powers lend no support whatever to the proposition that we may, under the guise of exerting

commission is expressly conditioned by the act as in establishing a through route and joint rates when no reasonable or satisfactory through route exists, the courts will review the determination of the commission; and it was held that the personal references of many travelers for another through route to the Pacific, did not justify the Interstate Commerce Commission to establish a through route and joint rates to the Pacific where one through route existed available for the public.¹

While the commission has authority to condemn unjust and unreasonable rates and fix reasonable rates, it has no right to make a change in the rates for the purpose of protecting certain interests or encouraging certain industries where the rates were reasonable in themselves. The court, therefore, will review the orders of the commission not only on the constitutional ground that changes may be confiscatory, but on the further ground that the commission is not acting within its lawful jurisdiction.²

With its power thus enlarged by statute as well as by judicial construction the Interstate Commerce Commission is a unique illustration of an administrative board invested with the different powers of government.³ As an administrative body

judicial power, usurp merely administrative functions by setting aside a lawful administrative order upon our conception as to whether the administrative power has been wisely exercised.

"Power to make the order, and not the mere expediency or wisdom of having made it, is the question."

¹ Interstate Commerce Commission v. Northern Pacific R. R., 216 U. S. 538, 54 L. Ed. 608 (1910), affirming the circuit court in restraining the enforcement of the order of the Interstate Commerce Commission, 16 Inters. Com. Rep. For amendment of statute, following this decision, see Part II, section 15.

² Southern P. Co. v. Interstate

Commerce Com., 219 U. S. 433, 55 L. Ed. — (Feb. 20, 1911), reversing 177 Fed. 963.

³ From Opinion of Commission in the "Investigation of advances in Rates by Western Trunk Lines, 20 I. C. C. R. 9 (Feb. 22nd, 1911).

"By its decisions in the Abeline Cotton Oil case, the Illinois Central case, the supreme court has erected this commission into what has been termed "an economic court," or to give it a more commonplace definition, but one of perhaps of stricter legal analogy, a select jury to pass upon the reasonableness and justness of railroad rates, rules and practices. Within broad lines of discretion the courts regard the conclusions of the commission on question of

it enforces the executive power of investigation and prosecution. As a *quasi*-judicial body it exercises the judicial function of determining the reasonableness of existing rates and of suspending proposed increases of rate pending investigation, and also of declaring the existence of undue discrimination or preference, entitling the complainant to reparation; and its findings in awards of damages for reparation are given *prima facie* weight in any judicial proceeding to enforce the same. It also exercises what has been repeatedly adjudged to be essentially a legislative power in fixing a maximum of rates for the future.¹

This department of administration is in effect a distinct department of government recognized as developed *ex necessitate* from the complexity of the functions of modern government in regulating the details of commercial intercourse. We are thus compelled to revise our time honored conception of the distribution of the powers of government, as we have not only executive, legislative, and judicial departments, but also the department of administration, distinct from, and yet to a degree exercising the functions, which have been deemed appropriate to each of the others.²

§ 53. The commerce court.—Another important feature of the amendatory acts of 1910, was the organization of a commerce court, composed of five circuit judges, who are given exclusive jurisdiction over cases for the enforcement of orders of

fact as final. There is an appeal upon questions of law by the carriers to the courts, but unless a constitutional guaranty is violated the order of this commission is final, provided, of course, the commission does not overstep the jurisdictional limits placed upon it by the statutes. And as to the shipper this tribunal is his one and only resort against injustice." See also part II, sec. 16 of Interstate Commerce Act, *infra*.

¹ See Maximum Rate Cases, 167 U. S. 505, 42 L. Ed. 255. Also the Virginia Rate Cases, 211 U. S. 210, 53 L. Ed. 150 (1908).

² There is a blending of the judicial legislative and administrative powers in the powers of railroad commissioners in several of the states. The constitutionality of such acts has been sustained both in the state and federal courts. See *Express Co. v. Railroad Co.*, 111 N. C. 463; *Burlington, etc. R. Co. v. Dey*, 82 Iowa, 312; *Chicago, etc. R. Co. v. Jones*, 149 Ill. 361; *Georgia, etc. R. Co. v. Smith*, 70 Ga. 694. See also the *Railroad Commission Cases*, 116 U. S. 307, 29 L. Ed. 636, and *infra*, § 106.

the Interstate Commerce Commission other than for the payment of money, and over cases brought to enjoin any order of the Interstate Commerce Commission or the so-called "Expedition Cases" and also mandamus cases under the Interstate Commerce Act. This latter class of cases however was very much reduced in importance by the recent decisions of the supreme court (See Appendix), and the decisions of this commerce court, both as to the interlocutory orders and final judgments are subject to appeal to the supreme court of the United States.

It was at first proposed that the jurisdiction of this court should include the judicial or *quasi-judicial* jurisdiction which is now exercised by the Interstate Commerce Commission, thus relieving that body of the anomaly of being at the same time an investigator, prosecutor and judge. This plan was abandoned, and the jurisdiction of the court is taken not from the commission, but from the circuit courts of the United States, and whatever relief is afforded by the court will be to the other circuit courts, and not to the commission.¹

§ 54 (49). Regulation of bridges and ferries over navigable rivers.—The broadened conception of the federal power over interstate commerce in this direct regulation of such commerce is illustrated in the rulings of the supreme court with reference to the building of bridges and establishment of ferries

¹ For the early opinion of this court on its jurisdiction under the act as to the parties entitled to appear and holding that the right to resort to the court extended to every one injuriously affected by the order of the commission, see *infra*, § 395; 188 Fed. 221.

As to the distinction made by the commerce court between plant facilities and terminal facilities of railroads for which they are entitled to exact compensation, see *infra*, § 150.

For the consideration by the commerce court of the interdependence of rates in the determin-

ation of reasonableness see *infra* § 185; 188 Fed. 242. And as to right of railroads to exact demurrage on private cars, see *infra*, § 255.

President Taft in an address before the American Bar Association (August 31st, 1911) said with reference to the agitation for a separate court of patent appeals, that it had been suggested that the commerce court might find itself without sufficient business to occupy its time, and that the jurisdiction of the proposed court of patent appeals might be vested in that tribunal.

over navigable rivers, as also in the exercise of the legislative power in authorizing improvements, alterations and obstructions in public navigable waters. The power of the state to establish bridges over navigable and tide waters was admitted, subject however to the paramount authority of congress to declare a bridge an obstruction to navigation, the paramount authority of regulating bridges that affect the navigation of the navigable waters of the United States being admittedly in congress.¹ Thus in the case cited the Wheeling bridge constructed across the Ohio river under an act of Virginia had by decree of the supreme court at the suit of the state of Pennsylvania been declared in its then condition an unlawful obstruction of the navigation of the river and in conflict with the acts of congress regulating such navigation, and therefore ordered to be elevated or abated. Congress thereupon passed an act declaring the bridge to be a lawful structure in its then condition and elevation, and this act was sustained as giving full authority to maintain the bridge. The practice thereupon grew up of building bridges by state corporations—where the rivers constituted the boundary of states, securing the concurrent action of both states,—and at the same time obtaining an act of congress that the bridge, when constructed according to its provisions, should be a lawful structure and not an obstruction to navigation.

In 1894 however it was held² that congress had full authority to incorporate a bridge company for the construction of a bridge across a navigable river, and sustained the validity of the North River Bridge Company for the construction of a bridge across the Hudson river between the states of New York and New Jersey. The court said that it was not necessary for congress to recognize and approve bridges erected by authority of two states across navigable waters between them, but could, at its discretion, use its sovereign power, directly or through a corporation created for that object, to construct bridges for the accommodation of interstate traffic by land,³ as it undoubtedly may do to improve the navigation of rivers for

¹ *Pennsylvania v. Wheeling, etc. Co.*, 153 U. S. 525 (1894), 38 L. Ed. Bridge Co., 18 How. 421 (1855), 15 808.

L. Ed. 435. ³ *Willamette Bridge Co. v.*

² *Luxton v. North River Bridge Hatch*, 125 U. S. 1 (1888), 31 L.

the convenience of such traffic by water. In the case of this North River Bridge Company the act made provision for the condemnation of lands, for the construction and maintenance of the bridge and its approaches, and for just compensation to the owners.

In the case of ferries there is no such necessity of securing the sanction of congress, as there is no such obstruction to navigation.¹ But ferries as well as bridges are instrumentalities of interstate commerce when they cross rivers which are the boundaries of states, and as such are exempt from state control.²

In a recent case³ the court held that an unconstitutional burden was imposed on interstate commerce by an Illinois statute penalizing the carrying on of a ferry without a license, when applied to the transportation of loaded or unloaded railroad cars across the Mississippi river from the Illinois to the Missouri side. The court said that there was an essential distinction between a ferry in the restricted and legal sense of the term, and the transportation of railroad cars across a boundary river between two states, constituting interstate commerce, and that such transportation could not be subjected to burdens imposed by a state, which were direct burdens upon interstate commerce. In this case the power to grant the license was made discretionary; citizens of Illinois were to be preferred and the licensee could be required to conduct a general ferry business. The court therefore found it unnecessary to consider, whether the broad declarations of the power of the state to regulate ferries over navigable rivers constituting boundaries between states, supported in the earlier cases had not been modified by the rule laid down in the Gloucester Ferry case⁴ and the Covington Bridge case.

Ed. 629; *California v. Pacific Ry. Co.*, 127 U. S. 1 (1888), 32 L. Ed. 150.

¹ *Covington & Cincinnati Bridge Co. v. Kentucky*, 154 U. S. 204 (1899), 38 L. Ed. 962.

² *Covington, etc. Bridge Co. v. Kentucky*, 154 U. S. 204, l. c. 219, 38 L. Ed. 962 (1899); *Gloucester*

Ferry Co. v. Pennsylvania, 114 U. S. 196 (1885), 29 L. Ed. 158.

³ *St. Clair County v. Interstate Transfer Co.*, 192 U. S. 454 (1904), 48 L. Ed. 518.

⁴ *Conway v. Taylor, Executor*, 1 Black, 603, 17 L. Ed. 191 (1861); *Fanning v. Gregoire*, 16 How. 524, 14 L. Ed. 1043 (1853).

§ 55. Regulation of telegraph and telephone companies.— The amendment to the Interstate Commerce Act of 1910, extended for the first time the regulation of the act to interstate telegraph and telephone companies. Prior to this it had been recognized in a number of cases that the interstate business of such companies was interstate commerce; and before their inclusion under the Interstate Commerce Act their business was controlled by the rules of common law which are operative upon all interstate commercial transactions, except as they were modified by congressional enactment.

Congress has legislated from time to time in relation to telegraph lines in interstate commerce, but more particularly with reference to the grant of telegraph privileges to the government aided railroads. Thus, in 1862, congress included the right to construct, maintain and operate telegraph lines in its grant of the charters to build Pacific railroads.

Subsequently, in 1866,¹ congress granted to any telegraph company organized under the laws of any state the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by law, and over, along and across any of the navigable waters of the United States.²

This act of 1866 was construed by the supreme court³ as, in effect, amounting to a prohibition of all state monopolies in the telegraph business between the states. The court said that it was a legitimate regulation of commercial intercourse between the states and was proper legislation to carry into execution the powers of congress over the postal service. The statute

¹ 3 Compiled Statutes, p. 3579, title 65.

² The act also provided for the use of materials from the public lands, reserved to the government priority over other business and further provided for the purchase by the United States for postal, military or other purposes, all the property and effects of companies acting under the act at an ap-

praised value to be ascertained by five competent, disinterested persons, two of whom were to be selected by the postmaster general, two by the company interested and one by the four previously selected.

³ *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U. S. 1 (1877), 24 L. Ed. 708, 711.

did not extend only to such military and post roads as were upon the public domain. The state law of Florida conferring exclusive privileges upon a state telegraph company was declared to be in conflict with the legislation of congress.

This act of 1866 was permissive only. The privilege conferred carried with it no exemption from the ordinary burdens of taxation in a state where the companies owned or operated lines to telegraph,¹ nor did it carry with it any unrestricted right to appropriate public property of a state or city, but it was like any other franchise, to be exercised in subordination to public as well as private rights.²

The act of 1866 does not grant to telegraph companies accepting its provisions the power of eminent domain over the private property of railroad companies. A railroad right of way is not public property though often called a highway and subject to a certain extent to state and federal control. A telegraph company cannot, therefore, under the act of 1866, occupy a railroad right of way except by the consent of the railroad or under the power of eminent domain; and in the absence of federal or state provision for the exercise of such right of eminent domain, the railroad right of way can be occupied with telegraph poles only with the consent of the railroad company.³

The Interstate Commerce Commission is vested with jurisdiction over the government-aided telegraph lines constructed under the Pacific Railroad Act by the act of 1888,⁴ whereunder the commission is required to ascertain the facts and determine and order what arrangement should be made for the interchange of business required by the act, and it was made the duty of the railroad and telegraph companies to file with the Interstate Commerce Commission all contracts relating to the control and use of their telegraph lines and to file annual reports with the commission as to their condition and business.

¹ *Western Union Tel. Co. v. Ann Arbor R. R. Co.*, 178 U. S. 239, Massachusetts, 125 U. S. 530 44 L. Ed. 1052 (1900).
(1888), 31 L. Ed. 790.

² *St. Louis v. Western Union Tel. Co.*, 148 U. S. 92 (1893), 37 L. Ed. 380; *Western Union Tel. Co. v. Pennsylvania R. Co.*, 195 U. S. 540, 594, 49 L. Ed. 312, 332.

⁴ Act of Aug. 7, 1888, 25 Stat. L. 382.

The supreme court, construing this act, held that it was a lawful exercise of the powers of congress and that a contract between the Union Pacific Railway and the Western Union Telegraph Company, giving the latter company control of all telegraph business on its roads, was void. The act in this case required that the railroads should exercise by themselves alone all the telegraph franchises conferred upon them, and to allow equal facilities to connecting lines on terms just and equitable; the right of connection with equal facilities being given to any railroad which had accepted the provisions of the act of 1866.¹

The provisions of the Telegraph Act of July 24, 1866, did not apply to interstate telephone companies whose business is that of transmitting articulate speech between different points.² as it was held by the supreme court that in 1866 nothing was known of the telephone; and when therefore the act of 1866 spoke of telegraph companies, it only meant such companies as employed the means thus used or embraced by then existing inventions for transmitting by sounds or by signs in writing.

§ 56 (52). The release of the federal regulating power.—Interstate commerce may be regulated not only by the action of congress, but also by its inaction, as where the subjects require uniform regulation, the inaction is equivalent to a declaration that the commerce must be free. There is also a form of regulation, already referred to, where congress divests particular subjects of their commercial character, thus subjecting them, when delivered to their consignees in the original packages, to the police power of the state. It was contended in the *Rahrer*

¹ See also *United States v. Northern Pac. R. Co.*, 120 Fed. 546 (1903), where the circuit court held that a contract of the Northern Pacific R. Co. with the Western Union Telegraph Company was not violative of the act, as it provided for the exclusive use of one or two wires by the railroad company, for which the railroad company agreed to pay one-third the cost of construction and to transport the property and em-

ployes of the telegraph company in constructing and maintaining the line, free of charge. This case was therefore distinguished from the *Union Pacific* case.

² *Richmond v. Southern Bell Telegraph & Telephone Co.*, 174 U. S. 761, 43 L. Ed. 1162 (1899), reversing the circuit court, 78 Fed. 858, and the circuit court of appeals, 85 Fed. 19, and 28 C. C. A. 659.

Case¹ that the Wilson Act of 1890 was void, as the power of regulation vested in congress could not be delegated to the states. The court held that this was not a delegation of the federal power, but was merely a designation that certain subjects of interstate commerce should be governed by a rule which divested them of that character at an earlier period of time than would otherwise be the case. Congress, said the court, did not use terms of permission to the states to act, but simply removed an impediment to the enforcement of the state laws created by an absence of specific utterance on its part in respect to imported packages in their original condition. It imparted no power to the state not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction.

In the later Iowa case,² in 1898, the court, in holding that the term "arrival" meant delivery to the consignee, said that the act of 1890 was not to be construed as authorizing states or state laws to forbid the bringing into the state at all. In other words, the power of the state did not attach to the acts until the termination of the interstate commerce shipment, and that did not occur until the actual delivery of the shipment to the consignee. The court said this construction of the act of 1890 rendered it unnecessary to consider whether, if the act of congress had submitted the right to make interstate commerce shipments to state control, it would be repugnant to the constitution.

The right of congress therefore as adjudged in these cases to surrender its regulating power only extends to the limitation of the original package rule as to a certain class of commodities, so that they should lose their interstate character and become subject to the police power of the state when delivered to the consignee, and not when, as is the case with other shipments, the original package is broken up or sold and thus becomes merged in the general mass of property in the state.

§ 57 (53). Regulation by the delegation of power.—Congress in its legislation upon interstate commerce has vested in the

¹ *Supra*, § 18.

² *Rhodes v. Iowa, supra*, page 31.

Interstate Commerce Commission certain discretionary power in the enforcement of the statutes. Thus, in the Interstate Commerce Act, in section 4, the commission is authorized in special cases, after investigation, to grant an exemption to the carriers from the requirement of the section, that no greater rate shall be charged under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line, and the commission is authorized from time to time to prescribe the extent to which such carrier may be relieved from the operation of said statute. Also in the so-called Safety Appliance Act, the commission is, under section 7, authorized to grant an extension of time within which the common carrier may comply with the requirement of equipment with automatic car couplings prescribed by the act.

Under the act of March 3, 1899, concerning the construction of bridges over navigable rivers, the secretary of war is not only vested with the duty of approving plans for the construction of bridges, but is, under section 11, given the power to establish harbor lines, and under section 3 to permit in his discretion temporary deposits in the rivers.

These cases seem to be within the rule declared by the supreme court¹ in sustaining the powers conferred upon the president by section 3 of the act of 1890 to suspend by proclamation the free introduction of certain articles when satisfied that the country producing them imposes duties upon the products of the United States. The court said this was not a delegation of legislative power, but merely made the president the agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect. He had no discretion in the premises except in respect to the duration of the suspension order, and that related only to the enforcement of the policy established by congress.

There is no unconstitutional delegation of legislative and judicial power in the authorization of the secretary of war, under the River and Harbor Act of March 3, 1899, to require, after a hearing, such changes or alterations in a bridge as

¹ Field v. Clark, 143 U. S. 649 (1892), 36 L. Ed. 294. See also Butfield v. Stranahan, 192 U. S. 470 (1904), 48 L. Ed. 525. On

general subject of delegation of legislative power, see State v. Atlantic Coast Line, 56 Fla. 617 32 L. R. A. (N. S.) 639 (1908).

would render navigation reasonably free and unobstructed, when he was bound to give a hearing to the parties before taking action, and there was in this proceeding no taking of private property for public use without compensation.¹

A legislative body may delegate to an executive or administrative officer the power to find some fact or situation on which the operation of a law is conditioned, or to make and enforce regulations for the execution of a statute according to its terms, but it cannot delegate its law-making power, its power to exercise the indispensable discretion to make, to add to, to take from, or to modify the law. It was therefore held that congress did not in fact delegate, and could not delegate to the secretary of agriculture or to any other executive officer, the power to add to the class of railroad companies, or to the acts punishable under a penal statute, such others as in his judgment ought to be punished thereunder.²

§ 58 (54). Additional acts of congress in the regulation of commerce.—Congress in recent years has enacted several laws in the regulation of interstate commerce. The act establishing a Bureau of Animal Industry, for preventing the exportation of diseased cattle, and for the extirpation of disease among domestic animals, enacted May 29, 1884, was held by the supreme court³ not to cover the subject of transportation of live stock from state to state, so as to preclude the enactment of state legislation for the protection of the property of the state.

Congress in recent years has passed a number of acts primarily for the promotion of the safety of employes and thus for the safety of travelers on interstate railroads.⁴ Thus, it

¹ *Monongahela Bridge Co. v. U. S.*, 216 U. S. 177, 54 L. Ed. 435 (1910). In *Hannibal Bridge Co. v. U. S.*, 220 U. S. —, 55 L. Ed. — (1911), the court held that a bridge over the Mississippi river, constructed under authority of special act of congress, was subject to the authority of the secretary of war under Act of March 3, 1899; and that a notice to the bridge company to

make certain alterations, signed by the assistant secretary of war, and showing that it came from the War Department, was sufficient notice under the act.

² *Merchants' Bridge T. Ry. Co. v. United States*, C. C. A. 8th Circuit, 188 Fed. 191 (1911).

³ *Reid v. Colorado*, *supra*, § 35.

⁴ The Interstate Commerce Commission in its annual report for 1904 discusses at length the

has required railroads to equip their cars with automatic couplers and brakes, imposing an absolute duty and liability in that regard. It has required locomotives to be equipped with ashpans which can be emptied or cleaned without the necessity of an employe going under the locomotive. See Appendix.

Congress has also legislated in regard to the liability of interstate railroads to their employes. The first act, approved June, 11, 1906, having been adjudged invalid, in that it did not limit the recovery to employes engaged in interstate commerce,¹ another act was passed in 1908 to cure this defect.²

An act has also been passed³ limiting the hours of service of trainmen, and telephone and telegraph operators in interstate service, and congress has also (1911) ordered an investigation by a commission of the question of substituting the rule of compensation in place of a liability for negligence where employes are injured in interstate railroad service.

Congress has also required railroads engaged in interstate commerce to make full reports of all accidents to the Interstate Commerce Commission.⁴ This requirement is not limited to accidents on trains engaged in interstate commerce, but includes all accidents on the railroads engaged in interstate commerce; and a railroad is so engaged within the regulating power of congress when it makes shipments by through routing in interstate commerce. This act has not been construed.

Recent legislation by congress in the regulation of interstate commerce includes the prohibition of interstate carriage of obscene literature,⁵ of game killed in violation of state laws,⁶

subject of the increasing number of railroad accidents and strongly recommends legislation by congress requiring the adoption of the block system and the block signal.

¹ See *Howard v. Ill. Cent. R. R. Co.*, 207 U. S. 463, 52 L. Ed. 297 (1907), Justices Moody, Harlan, and Holmes dissenting. Three of the justices, Peckham, Fuller, and Brewer, did not concur in holding that congress had power to legislate on the subject of the relation

between master and servant in the railroad service.

² See Act of April 22, 1908, U. S. Compiled Stat. 1901, 1909 Supp. p. 1171, and Act of April 5, 1910, See *infra*, § 527 *et seq.*

³ See *infra*, p. —.

⁴ Act of March 3, 1901, *infra*.

⁵ Act of February 8, 1897, 3 § 540.

⁶ Act of May 25, 1900, 3 Comp. Stat. 3180 § 181.

condemned carcasses of animals,¹ lottery tickets,² dairy products falsely labeled or branded as to the state or territory in which produced,³ and also what is known as the White Slave Act,⁴ the transfer of women for immoral purposes from state to state.

Congress has also empowered the secretary of agriculture to establish rules concerning exportation and transportation of live stock and issue certificate of freedom from disease, and providing for admission of cattle so certified into any state without further inspection or fees.⁵

The police power of the state was extended to oleomargarine, butterine, etc., as it had theretofore been extended to liquors in the "original package."⁶

As to the anti-trust legislation of congress and also legislation in relation to the relations of labor and capital in interstate commerce, see chapter V, *infra*, "Business Combinations in Interstate Commerce" and chapter VI "Labor Combinations in Interstate Commerce."

Congress has also legislated extensively in regard to transportation by water in the navigation acts. The Interstate Commerce Act only regulates water transportation, when the transportation is partly by railroad and partly by water under a common control or management.

In 1906 important statutes were enacted, to-wit the Meat Inspection Act⁷ the Food and Drugs Act⁸ and the National Quarantine Laws,⁹ all illustrating the trend for the enlargement of federal power through its extension to classes of subjects, wherein the states have hitherto exercised concurrent jurisdiction during the non-action of congress. Of these the most important is the Food and Drugs Act, commonly known as the Pure Food Act, approved June 30th, 1906. This act makes it un-

¹ Act of May 2, 1895, 3 Comp. Stat. 3192.

² Sec. 6, *supra*. Act of March 3, 1895, 3 Comp. Stat. 3178.

³ Act of July 1, 1902, Supp. Comp. Stat., p. 1182.

⁴ Act of June 25, 1910. See *supra*, sec. 7.

⁵ Act of February 2, 1903, Supp. Comp. Stat., p. 1183.

⁶ Act of May 9, 1902, Supp. Comp. Stat. p. 369.

⁷ Act of June 30, 1906, Supp. Comp. Stat. 1106.

⁸ Act of June 30, 1906, Supp. Comp. Stat. 1106.

⁹ Act of June 19, 1906, Supp. Comp. Stat. 1244.

lawful to manufacture within any territory or the District of Columbia or to introduce into any state or territory or District of Columbia from any other state or territory or District of Columbia or from any foreign country or to ship to any foreign country, any article of food or drugs which is adulterated or misbranded, within the meaning of the act.

§ 59 (55). The department of commerce and labor.—In 1903 congress established the department of commerce and labor, the secretary at the head being made one of the executive officers of the government and as such one of the president's advisers known as the cabinet.¹

This department included several of the bureaus theretofore included in other departments, and among others the Department of Labor, which had been established by congress in 1888.²

Section 5 of this act establishes a Bureau of Manufactures, and section 6 a Bureau of Corporations, which is vested with the same power and authority of investigation in respect to corporations and combinations engaged in interstate commerce as is conferred on the Interstate Commerce Commission in respect to railroads. The commissioner of corporations is given powers of investigation, with the right to summon witnesses and call for the production of books and papers, subject to the same immunities against the enforcement of self-incriminating testimony, as is contained in the act of 1893 concerning the Interstate Commerce Act.³

This act includes in section 6, as subject to the investigation of the commissioner of corporations, corporations engaged in insurance. It has been adjudged, *supra*, § 8, in successive opinions of the supreme court, that insurance is not commerce in any of its forms.⁴

This act has not been judicially construed. The federal

¹ Act of February 14, 1903, 194 U. S. 25, 48 L. Ed. 860 (1903); Supp. Comp. Stats., p. 87, *infra* § 351.
§ 494.

² *Infra*, § 495 *et seq.*

³ Interstate Commerce Commission v. Brimson, 154 U. S. 447, 38 L. Ed. 1047 (1894); Interstate Commerce Commission v. Baird,

⁴ The Commissioner of Corporations in his first annual report, December 1904, says that if this purpose is irrevocably settled, the powers of the commissioner relative thereto are of purely a stat-

government has obviously no visitorial power over corporations which it does not create, and the power of the commissioner to make investigations or to compel reports would be clearly limited to transactions in interstate commerce, to the same extent as the powers of the interstate commerce commission are limited to transactions in interstate as distinguished from domestic commerce.

While the powers of the Bureau of Corporations are described mainly by reference to those contained in the Interstate Commerce Act, the latter is a *quasi-judicial* body, in the sense that it is empowered to hear complaints and make charges and findings for judicial investigation and determination, while the commissioner of corporations is at the head of an administrative department of the government. The powers of investigation vested in this bureau are to be used for the purpose of assisting the legislative department in making laws, and the executive department in enforcing them. The commissioner has no judicial powers, and within the scope of his duties must appeal to the courts for the enforcement of his orders.¹ The statute has not been judicially construed, nor

tical, voluntary, non-compulsory nature. He suggests however, that in view of the rapid development of the insurance business, its extent, the enormous amount of money and the diversity of interests involved and the present business methods, that under existing conditions, insurance is commerce and may be subject to federal regulation through affirmative action by congress.

It is difficult to see, however, if the supreme court adheres to its present rulings, how the jurisdiction of congress can be enlarged by its own declarations of the extent of its powers.

¹ It is said in the every exhaustive first annual report of the commissioner, Hon. James R. Garfield, "that many of the specific powers of the Interstate Commerce Com-

mission are clearly inapplicable to the purpose of the Bureau of Corporations. He cannot make investigations or procure and enforce information by means of his compulsory powers for the purpose of enforcing the penal provisions other than those contained in the organic act of the bureau, nor can he furnish information so procured to private individuals for their personal use. His compulsory investigatory powers are further limited by the rights of privacy of the citizen which may not be invaded by inquiry except for a definite, constitutional and legal object, and only such matters may be investigated as relate to and give information upon the objects of the bureau and its work."

has any appeal been made to the courts to enforce its powers of investigation by compulsory testimony or production of books.¹

¹ Commissioner Garfield says in his report of December, 1904, "In brief, the policy of the bureau in the accomplishment of the purposes of its creation is to co-operate, and not antagonise, the business world. The immediate object of its inquiries is the suggestion of constructive legislation, not the institution of criminal legislation. It proposes through exhaustive investigations of law and fact to secure conservative action, to avoid ill considered attack upon corporations which will avoid unfair and

dishonest practices. Legitimate business law respecting persons and corporations have nothing to fear from the proposed exercise of this governmental power of inquiry." It was held in *U. S. v. Armour*, 142 Fed. 808 (N. D. of Ill.) 1906, that the immunity under act of congress extended to an individual who gave self-incriminating statements to the commissioner of corporations in an investigation under this section. See *infra*, section 12 of Act. See also Act of June 13, 1906.

CHAPTER IV.

THE FEDERAL POWER OF REGULATION IN INTERSTATE COMMERCE.

- § 60. No judicial formulation of extent of power.
- 61. The supremacy of federal regulation.
- 62. Federal regulation of employees performing both intrastate and interstate service.
- 63. The federal regulating power and state corporations.
- 64. Limitations upon the federal authority in interstate commerce.
- 65. Prohibition as a means of regulation.
- 66. Regulation of commerce through the taxing power.
- 67. The federal power of granting corporate charters.
- 68. Federal incorporation as a means in the exercise of the commerce power.
- 69. Relation of the states to federal corporations.
- 70. The requirement of federal franchise for business corporations in interstate commerce.
- 71. The development of the latent federal power in the regulation of commerce.

§ 60. No judicial formulation of extent of power.—The exercise of the federal power, as new conditions develop in interstate and foreign commerce, does not require any “new nationalism” in the expansion of the constitution by amendment or judicial construction. Fortunately the framers of the constitution wisely stated the federal power in language so broad and comprehensive, that it is as clearly applicable to the complex conditions and agencies of the commerce of the present day as was the simple conditions and agencies when the constitution was adopted.¹ The constitution of the United States marks only the great outlines of power to be possessed by the government without attempting to enumerate in detail and specify each and every one.² This great principle of constitutional law is happily illustrated in the simple and comprehensive phrase of the commerce clause.

Until recent years we were compelled to rely, in determining the possible limits of the federal power in interstate commerce, upon the language of the court in deciding the limits of the authority of the states; but the activity of federal legislation of late has presented directly the question of the authority of congress.

¹ See *U. S. v. Debs*, Sec. 1, *supra*. *Maryland*, 4 *Wheat* 316, 4 *L. Ed.*

² *Marshall, C. J., McCullough v.* 579.

The supreme court has frequently declined to formulate a general rule as to the precise line where the power of congress begins and the power of the state ends.¹ It was on this question of the conflict between the admitted powers of the federal government and the states that Chief Justice Marshall said that the power and the restriction on it, though quite distinguishable, when they did not approach each other, may well, like the intervening colors between white and black, approach so nearly as to perplex the understanding, as colors perplex the vision in making the distinction between them.²

This extent of the federal power was directly presented in the Lottery cases, where there was a close division of the court; but it was said in the prevailing opinion that the whole subject was too important, and the question suggested by its consideration too difficult of solution to justify any attempt to lay down a rule for determining in advance what legislation could be enacted under the commerce clause of the constitution.³

§ 61. The supremacy of federal regulation.—While no general judicial rule as to the extent of the federal power in interstate commerce has been formulated, one principle has been distinctly declared by the supreme court, and that is the supremacy of the federal power over state legislation where exercised as appropriate means in the regulation of interstate commerce.

This supremacy is illustrated when congress acts in that class of cases, wherein the court has adjudged that the state have a concurrent power of legislation in the non-action of congress; that is, where congress has exercised its power of regulation by non-action. There is thus a wide legislative discretion in congress to determine when a subject is capable of uniform legislation in interstate commerce; and when it is so determined, all state legislation in respect to such matters, inconsistent therewith, ceases to have force, whether formally abrogated or not, and the regulations prescribed by congress alone control. It is for the supreme court to determine, when a question arises, as to whether a state law is thus abrogated

¹ *Welton v. Missouri*, 91 U. S. 275, 23 L. Ed. 347 (1875); *Hall v. DeCuer*, 95 U. S. 485, 24 L. Ed. 547 (1876).

² *Brown v. Maryland*, 12 Wheat. 419, 6 L. Ed. 678 (1827).

³ See Lottery Cases, *supra*.

by the exercise of the power by congress. The power thus exercised by the states will in this way be suspended until the national control is abolished by congress, and the subject is thereby, by the non-action of congress, again left under the control of the states.¹

As repeatedly declared by the supreme court the power to regulate commerce is vested in congress as absolutely as it would be in a single government, and is limited only by the constitution.² The paramount authority of congress, when it legislates in interstate commerce, is recognized by the decisions of the state courts in declaring the statutes of their own states abrogated by the action of congress.³

§ 62. Federal regulation of employees performing both intrastate and interstate service.—Congress cannot, as was determined in the first Employers' Liability case, legislate directly concerning the liability of railroads to their employees, engaged in intrastate traffic, but it is no objection to legislation enacted for the protection of interstate employees, that such employees owing to the conditions of railroad service, also rendered service in intrastate operations. Thus, it was urged against the constitutionality of the Hours of Service Law of 1907, limiting the hours of service of interstate employees, that the interstate and the intrastate operations of the interstate railroads were so interwoven, that it was utterly impracticable to divide their employees in such manner, that the duties of those, who are engaged in connection with interstate commerce, shall be confined to that commerce exclusively. But the supreme court said⁴ that congress could not be thus denied the effective exercise of its constitutional authority. The length of hours of service of railroad employees had a direct relation to the efficiency of the human agencies, upon which protection to life and property of passengers as well as employees necessarily depends. If then it is assumed

¹ *Reid v. Colorado*, 187 U. S. 137, 47 L. Ed. 108 (1902).

² *Lottery Cases*, *supra*. This supremacy of the Federal power was also illustrated in the decision by the supreme court (October, 1911) in the case of Southern Railway, that the Safety Act was applicable to all equipment of an interstate railroad whether

at the time carrying state or interstate traffic. See *infra*, § 508.

³ See *supra*, § 35, as to effect of Hours of Service Act in Wisconsin and Missouri, and Employer's Liability Act in Arkansas and Georgia.

⁴ *B. & O. R. R. Co. v. Interstate Commerce Commission*, 220 U. S. 94, 55 L. Ed. — (1911). In this

that congress can limit the hours of labor of employes engaged in interstate transportation, it followed that this power could not be defeated by prolonging the period of service, through other requirements of the carrier, or by the commanding of duties relating to interstate and intrastate operations.

This principle that the federal authority, when appropriately exercised, is not impaired by incidental application of such regulation to intrastate service, is seen to be of far reaching importance when the complex conditions of railroad service are considered. An interstate railroad system is operated as a unit irrespective of state boundaries, has but one corps of officers and employes, and one equipment, and its operating employes are engaged in whatever capacity the exigencies of the service required.¹ This was forcibly illustrated in the unanimous opinion of the supreme court, holding, without dissent, that congress could penalize the absence of required safety appliances on cars of an interstate highway, whether used in moving state or interstate traffic, the court saying that the menace was not merely to that car and train but to others.²

§ 63. The federal regulating power and state corporations.—

While the regulating power over interstate commerce is vested in congress, transportation agencies whereby that commerce is carried on, railroad, express, telegraph and telephone companies are incorporated or organized under state laws, so that congress has no visitorial or charter power over them. These state organizations are, however, the agencies recognized and adopted by congress for carrying on interstate commerce, and the power of regulation is as effective over railroad operations, as if the corporations were organized by the federal government.

The federal government has also controlled and terminated the corporate life of state corporations for violation of federal law. In the Northern Securities case,³ a holding com-

case the court sustained the order of the Commission of March 3, 1908, requiring monthly reports under oath, showing the instances where employes subject to the act had been on duty for a longer period than that allowed.

¹ This principle of federal supremacy has been discussed in

connection with regulation of state rates in cases of alleged interference with interstate commerce. See *infra*, Chapter VI.

² See *Southern R. Co. v. U. S.*, 32 Sup. Ct. Rep. 2 (Oct. 30, 1911), affirming 164 Fed. 347. See *infra*, § 508.

³ *Infra*, § 76.

eral law. In the Northern Securities case,² a holding company organized under the laws of New Jersey, with the charter power to hold and acquire the stocks of other companies, was adjudged an unlawful combination in restraint of interstate commerce in its holding of the stocks of competing interstate railways, and its dissolution was decreed and enforced by the federal courts.

The prohibitions and penalties of the Anti-Trust Act have been enforced against state business corporations engaged in interstate commerce,¹ and corporations offending against that act have been dissolved by the federal courts, as unlawful combinations. The production of the corporate books and papers of state corporations before federal grand juries and other investigating bodies has been enforced,³ and congress has imposed an excise tax upon the doing of business as a corporation under state laws.⁴

Although the power of regulation of interstate business has been thus effectively exercised over interstate railroad operations, the control of the capitalization of the railroads and other corporations acting as federal agencies in interstate commerce remains in the states whereunder they are incorporated. It has been urged that the control by the federal government of interstate rates cannot be effective, without the control of the stocks and bond issues of the carriers; and that the exercise of the state authority in limiting such securities issued by an interstate railroad may interfere with and embarrass interstate commerce, when the issue of such securities is essential for raising funds for necessary facilities in interstate traffic. In other words such a control may concern not only the state of incorporation, but all the states in which the railroad is operated, and therefore may become a subject of federal and not state control.⁴

¹ *Infra*, chapter V.

² *Infra*, § 348.

³ *Infra*, § 66.

⁴ Under section 16 of the Commerce Court Act of June 18, 1910, the president appointed a commission of which President Arthur T. Hadley of Yale University was chairman, to investigate questions pertaining to the issu-

ance of stocks and bonds by railroad corporations subject to the provisions of the act to regulate commerce, and the power of congress to regulate or affect the same." See report of this commission transmitted by the president to congress, Dec. 1911, Appendix, *supra*.

§ 64. Limitations upon the federal authority in interstate commerce.—While the authority of congress to regulate rates or to delegate that authority to a commission has been uniformly sustained, since the passage of the Act of 1887, and in effect conceded, this power and all regulating legislation must be exercised subject to the constitutional requirement of due process of law, “and against the taking of private property for public use without compensation.” In the exercise of this regulating power congress or the commerce commission is restrained also by the provision of the constitution, that “no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another.” “Ports of entry,” established under the customs laws are now not only on the seaboard as formerly and at the time of the adoption of the constitution, but are scattered throughout the interior as land ports. The construction of this constitutional application to the regulation of carriers charges, in the recognition of differentials in favor of competing ports has not been judicially determined. Congress was advised by the attorney general when the amendment of 1906 to the Interstate Commerce Act was under consideration that “reasonable rates” determined by the legislative authority would not constitute a preference within the prohibitions of this section of the constitution, even though they resulted in a varying charge per ton, per mile, to and from the ports of the different states.¹

The power of congress in the regulation of commerce is limited, as are all the powers of the federal government, by the terms of the grant, as the government is one of enumerated powers, and the powers not granted to congress are reserved for the states and the people. While the power to regulate interstate commerce can be exercised by congress as effectively as by a single government with a wide discretion in the selection of means appropriate to the end, this power is limited by the terms of the constitutional grant. Congress is, therefore, without power to control commerce within a state.² Neither

¹ Opinion of Attorney-General Moodey to senate, May 5, 1905, Vol. 2, Senate Documents, p. 1674.

² See *Addyston Pipe & Steam Co. v. U. S.*, 175 U. S. 211, 44 L. Ed. 136 (1899).

congress nor the federal courts could deal with commercial combinations in a state not affecting interstate commerce, but where the combinations do affect interstate commerce it is immaterial that they are organized under state laws.

§ 65 (57). *Prohibition as a means of regulation.*—An important and far reaching question involved in the extension of the federal regulation of commerce was discussed in the Lottery cases. It was there strongly contended by four dissenting judges¹ that the power to regulate commerce did not include the power to prohibit certain classes of traffic on distinctly moral grounds which were properly consignable by the local police authority of the states, as the power delegated to congress was for the purpose of securing the freedom of interstate commerce and preventing the hostile or discriminating action of the states interfering therewith, and was thereby distinguished from the sovereign control over foreign commerce, and that congress had no general police powers, such as are reserved in the states.

The prevailing opinion did not directly dispute or discuss these positions and declined to formulate any rule as to the power of congress, but based the conclusion upon what was essentially the moral view, that the lottery business had grown into disrepute and had become offensive to the people of the country, was a kind of traffic that no one was entitled to pursue as a right, and that under the circumstances of the particular case prohibition of this class of traffic was an appropriate method of regulation for congress to adopt. The decision was therefore limited to the points that lottery tickets were subject of traffic, and that congress could lawfully prohibit such traffic in interstate commerce.²

Congress can therefore prohibit in interstate commerce a

See also *U. S. v. Knight Co.*, 156 U. S. 1, 39 L. Ed. 325 (1894).

¹ Justices Fuller, Brewer, Shiras and Peckham.

² The court had sustained a statute excluding lottery tickets from the mails. See *In re Jackson*, 96 U. S. 727, 24 L. Ed. 877 (1878), and *In re Rapier*, 143 U. S.

110, 36 L. Ed. 93 (1892). This was on the ground that as congress furnished postal facilities it had the right to say what should be carried therein. But it was said that congress could not prevent the carriage of such tickets by other means, though they were excluded from the mails.

specific class of traffic which is deemed injurious or offensive to the public, and it may also prohibit unlawful combinations and monopolies on the ground that such prohibition is necessary for the protection of the freedom of interstate commerce.

The power to prohibit is necessarily involved in any effective federal control of the corporate agencies engaged in the conduct of commerce, whether through federal incorporation or any form of federal franchise, that is, where in order to make the federal system effective its adoption must be made compulsory. Congress has thus far legislated with reference to the subjects of commerce, and not concerning the corporate relations of parties engaged in such commerce.

§ 66 (58). Regulation of commerce through the taxing power.—Interstate commerce may also be regulated through the exercise of the *taxing* power by congress. While congress has not an unlimited power as to the purpose of taxation, and can levy taxes only in order to pay the debts and provide for the common defense and general welfare of the United States,¹ it is also true that under the permanent revenue system of the government, taxes are levied, not for specific purposes, but by continuing laws establishing the rate of customs duties and internal revenue taxes, and questions relating to the lawful purposes of taxation do not arise in levying revenue taxes but in the appropriation of public funds for public needs.

It is well recognized that the power of taxation is sometimes invoked with no purpose of revenue in view, but solely to destroy the interest or business upon which the tax is levied by taxing it out of existence. Thus the notes of the state banks were taxed out of existence in order to open the means for circulating the notes of the national banks. This act was sustained by the supreme court.² The court said that it was immaterial that the tax destroyed the business or franchise exercised under state authority. While the only lawful purpose of taxation is revenue, the amount of the tax on any subject within the scope of the taxing power is for the legislative discretion to determine. In the words of Chief Justice Marshall

¹ Story on the Constitution, sec. 907.

² Veazie Bank v. Fenno, 118 Wall. 533 (1869), 19 L. Ed. 482.

in *McCulloch v. Maryland*,¹ "it is a perplexing inquiry unfit for the judicial department, what degree of taxation is a legitimate use and what degree may amount to an abuse of the power?" A tax on oleomargarine, as is well known, was imposed for the avowed purpose of destroying the business. It therefore follows that congress, subject to the constitutional requirement of geographical uniformity² and to the limitations of direct taxation,³ could impose indirect taxes and excises on subjects and facilities of commerce or upon the privilege of carrying on such commerce, whether by individuals or corporations, and that the amount of such taxes would be determined by the discretion of congress.⁴

§ 67 (59). **The federal power of granting corporate charters.**—The unexercised or undeveloped power of congress in interstate commerce is now discussed more particularly with reference to the power of congress in federal incorporation of business or trading companies. Interstate and foreign commerce under modern business conditions are almost wholly carried on by corporations chartered by the several states. The states therefore have the sole visitorial control of the organization of the business associations, through and by which the interstate and foreign business, subject to the exclusive jurisdiction of congress, is carried on. The difficulty of effectual governmental regulation of such commerce is apparent.

The power to charter a corporation is not among the enumerated powers of congress, but in the great case of *McCulloch v. Maryland*⁵ the court based the power to charter a national bank upon the right of congress to adopt incorporation as a reasonable means of carrying into effect its enumerated

¹ *Supra*, § 5.

² *Head Money Cases*, 112 U. S. 580, 28 L. Ed. 798 (1884); *Knowlton v. Moore*, 178 U. S. 41, 44 L. Ed. 969 (1900).

³ *Income Tax Cases*, 158 U. S. 601, 39 L. Ed. 1108 (1894); *Nicol v. Ames*, 173 U. S. 509, 43 L. Ed. 786 (1899); *Knowlton v. Moore*, *supra*.

⁴ The extent of this taxing power was illustrated in the deci-

sion sustaining the tax upon the net earnings of state corporations. *Flint v. Stone-Tracy Co.*, 220 U. S. 107, 55 L. Ed. — (1911). This tax was advocated in congress not only as a revenue measure, but because of the regulation through incidental publicity of corporate business which would be secured.

⁵ 4 *Wheat*. 316, *supra*.

powers. "Incorporation," said the court, "is never made the end for which their powers are exercised, but a means by which their objects are accomplished." . . . "The power of creating a corporation is never used for its own sake, but for the purpose of affecting something else." The bank, therefore, was lawfully incorporated as a means of managing the great fiscal concerns of the government. The constitutionality of the national banking act of 1864 was based on the same principle. The national banks organized under the act, said the court, were the instruments designed to be used to aid the government in the administration of an important branch of the public service. They are means appropriate to that end.¹

The power of congress to incorporate railroad companies to carry on interstate commerce, has not only been conceded, but has been exercised in the incorporation of the Pacific Railroad companies;² and the chartering of a corporation for constructing a bridge over a navigable stream forming the boundary of two states and condemning the property for approaches thereto, had been directly sustained.³ The power of incorporation in these cases was upheld as a reasonable and proper means of regulating commerce between the states, as these corporations were direct instrumentalities for carrying on interstate commerce.

A corporate franchise involves the power *to be*, and also the power *to do*. Congress has the power to grant a corporate franchise for the construction of national highways. The supreme court in the Pacific Railroad Tax cases, said that in former times this power was exercised very little, as commerce was then conducted wholly by water, and many of our statesmen had entertained doubts as to the existence of the power to establish ways of communication over land. But since the expansion of the commerce of the country, the multiplication of its products and the invention of railroads and locomotion by steam, land transportation has so vastly increased, that a

¹ Farmers, etc., National Bank v. Dearing, 91 U. S. 29 (1875), 23 L. Ed. 196.

² Pacific R. Cases, 115 U. S. 2, 29 L. Ed. 319 (1885); California v. Pacific Railroads, 127 U. S. 1, 32 L.

Ed. 150 (1888); Decker v. R. R. Co., 80 Fed. 723 (1887).

³ Luxton v. North River Bridge Co., 153 U. S. 525, 38 L. Ed. 808 (1894).

sounder consideration of the subject has prevailed and led to the conclusion that congress had plenary power over the whole subject.

Congress has granted charters of incorporation with franchises to be exercised in the district of Columbia, as assurance companies,¹ and savings banks and trust companies.² A federal charter was also granted to the Maritime Nicaragua Canal Company for facilitating intercourse between the Atlantic and Pacific oceans.³ The National Trades Union Incorporation Act, *infra*, Appendix, contains no reference to interstate commerce except that the members must be resident in two or more states. No incorporation had been formed under this act up to July 1, 1911.

§ 68 (60). Federal incorporation as a means in the exercise of the commerce power.—As congress can exercise this power of incorporation as a means and not as an end, its power of incorporation under the commerce clause would necessarily therefore be limited in its grant to the carrying on of interstate and foreign commerce, with such corporate powers as would be fairly incidental to such general grant. Congress has no power over the business of manufacturing, mining or other local productive industries conducted in the states,⁴ and therefore such powers could not be granted by congress, nor exercised under a congressional grant.

It has been suggested⁵ that a "franchise to produce," as by manufacturing, would be incidental and essential to a franchise to sell, and therefore, congress would have the power to grant franchises for production as essential to the carrying on of interstate commerce. This position seems clearly untenable in view of the distinct declaration of the supreme court in the Knight case, that commerce is incidental to manufacture and succeeds to it, but is not a part of it, and that the jurisdiction of congress relates to commerce alone. As said in that case

¹ Act of February 14, 1865, 13 Stats. 428.

² Act of March 3, 1865, 13 Stats. 510.

³ Act of February 20, 1899, 25 Stats. 675.

⁴ United States v. Knight Co., *supra*.

⁵ Appendix A to Report to Commissioner of Corporations, Dec. 1904.

and in an earlier case,¹ the result of a contrary ruling would be that congress would be invested to the exclusion of the states with the power to regulate every branch of human industry. A corporation organized to engage in interstate and foreign commerce would necessarily buy in order to sell, and such purchases and sales, both domestic as well as interstate and foreign, could be held incidental, as essential to the exercise of the federal grant. The power "to produce," however, would involve manufacturing, mining and the whole range of local productive industries, and their regulation and control by federal authority, under the commerce power would essentially revolutionize the whole frame-work of our government, with its distinct divisions of the powers of sovereignty between the state and federal governments.

The difficulty does not lie merely in the conflict with the sovereignty of the state, which has exclusive jurisdiction over the business of manufacturing and producing within its borders, but in the limitation of the federal government to the powers expressly granted and to those which are fairly and reasonably incidental to those expressly granted.

While the power of congress to incorporate the *quasi-public* corporations such as railroads, bridges, canals, telegraph and telephone, and others which are in effect governmental agencies in carrying on interstate commerce, has been conceded, and exercised, the impracticability of separating commerce from manufacture and production in corporate business organizations leads to the doubt whether the incorporating power of congress can practically, even if lawfully, be extended beyond the direct agencies of interstate commerce.

§ 69 (61). Relation of the states to federal corporations.— Assuming that corporations are chartered by congress for the carrying on of interstate and foreign commerce, their status in relation to the state government can be determined by analogy to the relation now held by national banks, which are organized under federal law, and by interstate railroad corporations organized under federal law, and corporations, as railroad companies, transacting interstate business, though chartered under state law.

¹ *Kidd v. Pearson*, 128 U. S. 1, 32 L. Ed. 346 (1888).

National banks are not chartered under the commerce clause, but as banks of deposit and discount their ordinary business does not differ in any wise from that of the state banks in the same communities.¹ The Pacific railroads were incorporated by congress, and though chartered by the federal power, they transact local as well as through business, and as to the former are subject to the laws of the states where they operate.² It would seem, however, from expressions in the opinions cited, that this subjection to state control in the regulation of local rates results from a failure of congress to express any intention in the acts of incorporation that the company should be exempt from state control.

Assuming, therefore, that congress should incorporate companies for the purpose of carrying on interstate and foreign commerce, such companies could make domestic as well as interstate and foreign sales. Congress would have visitorial power over such corporations, as it has over national banks, but its domestic business would be subject to state regulation and control, as the domestic business of interstate carriers is subject to such state control. The state power of taxation would extend to the property of such corporations within its jurisdiction as it does now to the property of national banks. The franchise "to do," that is, the franchise to transact interstate and foreign commerce, which would be held by such corporation under the federal grant, would not be subject to state taxation, and neither the right to transact such business, nor such interstate and foreign business conducted by state corporations would be subject to state taxation; but the "business" so exempt is to be distinguished from the property employed in the jurisdiction in the transaction of the business, which would be subject to state taxation.

It has been suggested that federal incorporation of business companies would be ineffective without a "franchise to produce," as states could pass discriminating laws prohibiting sales to such corporations. It is obvious however, that any state statutes interfering with or discriminating against fed-

¹The Secretary of the Treasury, December, 1904, recommends that congress should make provision for the incorporation and regulation of trust companies.

²*Reagan v. Mercantile Trust Co.*, 154 U. S. 413 (1894), 38 L. Ed. 1028; *Smyth v. Ames*, 169 U. S. 466 (1898), 42 L. Ed. 819.

eral corporations in the exercise of their federal franchise would be clearly violative of the federal supremacy in the regulation of interstate commerce.¹

§ 70 (62). The requirement of federal franchise for business corporations in interstate commerce.—Another method of proposed regulation of interstate commerce is through the requirement of a federal franchise or license for state corporations to transact interstate commerce. This is the method which was recommended by the commissioner of corporations in 1904.²

¹ See *Haston v. Iowa*, 188 U. S. 220, 47 L. Ed. 452 (1903), as to holding void attempted state regulation of national banks.

On this general subject of the incorporation power of congress, see address of J. B. Dill before Harvard university, March, 1902, *Yale Law Journal*, 1902, on A National Incorporation Law for Trusts; Professor Horace L. Wilgus, Michigan State University Law School, in *Michigan Law Review*, February and April, 1904; report of Industrial Commission, Vol. 19, pp. 644 *et seq.*; also report of committee on Commerce of American Bar Association of 1904; Carmon F. Randolph in *Columbia Law Review* for March, April and May, 1903; bill of H. W. Palmer, 58th congress, H. R. 86. See also address of Professor Wilgus before State Board of Commissioners for Promoting Uniform Legislation, September 29, 1904, published by George Wahr, Ann Arbor, Mich., "Should there be a Federal Incorporation Law for Commercial Operations?" See also presidential address of Hon. Edgar Howard Farrar before American Bar Association (1911) suggesting that the states should co-operate in suppressing injurious combinations in

commerce by agreements made "with consent of congress," as authorized by art. I, sec. 10, par. 3 of the constitution. Attorney-General Wickersham, in an address before the Minnesota Bar Association, July 19, 1911, suggested as a matter for serious consideration whether congress might not, through an administrative board or commission, regulate the prices of commodities which were the subject of interstate commerce by applying the same rule which had been applied to prices for transportation by rail, as it seemed that the laws of supply and demand did not, and had not for many years worked in this country in a natural, unrestrained and unfettered manner. He also suggested that a federal incorporation act, while it might offer some difficulties, would help lay the ax at the root of the trust evil.

² Mr. Garfield, the commissioner of corporations, in his first annual report, December, 1904, recommends that congress consider the advisability of enacting a law for the regulation of interstate and foreign corporations, under license or franchise, which should provide a federal franchise or license to those engaged in interstate com-

Assuming that such a system was adopted, its effectiveness would of course depend upon its exclusiveness. Thus corporations not having such federal license would be excluded from the transaction of interstate commerce. It is true also that if a system of federal incorporation was adopted, it would not be effective if its adoption was voluntary, as under the present system corporate charters are sought from the states which are the most liberal in their incorporation laws. The adoption of federal charters could doubtless be made effective through the exercise of the federal power of taxation, as the same power was effective in the establishment of the national banking system.

The requirement of either method, therefore, would mean the exercise of the power of prohibition by congress by means of regulation, in that corporations not having the necessary franchise would be precluded from transacting interstate commerce. Such a policy as to the *parties* transacting interstate commerce would be essentially novel, as the power of prohibition has been heretofore exercised only as to the *subjects* of commerce, as in the lottery cases.

The supreme court held¹ that a state statute providing that an agent of an interstate express company should take out a license showing that the company he represented was possessed of a capital of \$150,000, was invalid. The court said that to carry on interstate commerce was not a franchise or a privilege granted by the state, but a right which every citizen of the United States was entitled to exercise under the constitution and laws of the United States, and the accession of mere corporate facilities in carrying on their business could not have the effect of depriving them of such right, unless congress should see fit to interpose some contrary regulation on

merce and a prohibition of all corporations or corporate agencies from engaging in interstate or foreign commerce without such federal franchise or license, and to include the imposition of all necessary requirements, as to corporate organization and management, as a condition precedent to the grant-license, with the right to refuse or ing of such federal franchise or

withdraw such franchise or license in case of violation of law, with the proper right of judicial appeal to prevent abuse of power.

See review of this report in the Michigan Law Review of February, 1905, by Professor H. L. Wilgus, "Federal License or National Incorporation."

¹ Crutcher v. Kentucky, 141 U. S. 47, 35 L. Ed. 649 (1891).

the subject. Although this decision was rendered with reference to the power of the state over an interstate express company, it would seem to follow, as the only regulating power is that of congress, that it can determine what, if any, regulation is required for the conduct of interstate commerce with corporate facilities.

But assuming that congress may have the power to determine on what conditions commerce may be conducted under corporate organizations, or by corporations, it does not follow that it would have an unlimited power in prescribing the terms and conditions of corporate organization to be exacted as a condition of such licenses. These requirements, it would seem, should have a reasonable relation to the business of interstate commerce, over which alone congress has the regulating power.

§ 71 (63). **The development of the latent federal power in the regulation of commerce.**—The commerce clause in the constitution written in the days of the stage coach and the sailing vessel, has been, and is being adapted, by legislative enactment and judicial construction, to the age of steam and electricity. This does not mean that there has been any strained judicial construction of the constitutional power, for the powers of government were wisely declared in the constitution in broad and comprehensive terms which have proved adequate for the changed economic conditions and the tremendous development of commerce between the states. These forces have compelled a judicial recognition of the latent federal power in the commerce clause of the constitution. These influences will doubtless be felt in the future as they have in the past. Questions of the present day which are now crowding for solution, growing out of new business conditions, the development of great combinations both of commerce and labor, discussed in the succeeding chapters, will bring about new legislation and, doubtless, in time influence the judicial construction of the commerce clause in the application to new conditions which demand an effective governmental control.

Whatever the old time prejudice against the extension of federal power under the complex governmental system of the United States, the practical good sense of the American people recognizes the necessity of substituting an adequate federal

authority in place of an inadequate state authority to meet pressing public needs. This is illustrated in the practical unanimity with which such legislation as the Interstate Commerce Act, the Anti-Trust Act, and the recent extensions of authority have been enacted by congress. Capitalists in control of great commercial combinations prefer one regulating master to forty-six. In like manner the labor organizations, such as the Brotherhoods of Railroad Employes, seek for legislation for their interests which will be adequate and effective and therefore ask for federal in place of state action. It is therefore because there are public needs for the exercise of authority adequate to deal with them, that this exercise of federal authority is demanded.

The broadened judicial conception of the federal power in interstate commerce, is illustrated in the comparative unanimity of the recent (1911) decisions of the supreme court in the application and enforcement of the commerce clause, recalling therein the unanimity of the court in the great constitutional decisions of our early history, and contrasting with the close divisions of the court of a more recent date.¹

Judicial constructions as well as legislation may be influenced not only by new business economic and social conditions, and the public opinion based thereon, but also by changes in the moral standards of public opinion. Thus the prevailing opinion in the lottery cases was based upon a distinctly moral ground that public opinion condemned lotteries as recognized public nuisances; while at the time of the adoption of the constitution and for a generation thereafter lotteries were a recognized means approved by public opinion for raising money for educational and charitable purposes. It would have appeared strange indeed to the framers of the constitution that the federal power could ever be successfully exerted to prohibit interstate traffic in lottery tickets.²

¹ The Anti-trust and Railroad cases, *infra*, chapter V; Lottery cases, *supra*, § 65; Northern Securities case, *infra*, § 76.

² See Waite, C. J., in *Stone v. Mississippi*, 101 U. S. 814, 25 L. Ed. 1079 (1879). In *Cohens v. Virginia*, 6 Wheat. 264 (1821), 5 L. Ed. 257, wherein Marshall, C. J.,

delivered his great opinion on the supremacy of the federal judicial power, the case was that of a party claiming the right to sell lottery tickets in Virginia for a lottery in the District of Columbia, established under a charter granted by congress in 1812.

CHAPTER V.

BUSINESS COMBINATIONS IN INTERSTATE COMMERCE.

- § 72. The demand for federal regulation of business combinations.**
- 73. The Anti-Trust Act of 1890.**
- 74. Restraint of trade in interstate commerce under the common law.**
- 75. Constitutionality of the act.**
- 76. Railroads included in the act.**
- 77. A reasonable construction and reasonable restraints of trade distinguished.**
- 78. Direct and incidental restraint of trade.**
- 79. Suppression of competition must be substantial to be a restraint of trade.**
- 80. The modern law of restraint of trade.**
- 81. Illegal combinations in interstate commerce.**
- 82. Complete suppression of competition not essential.**
- 83. Monopoly within the meaning of the act.**
- 84. No application to commerce within a state.**
- 85. State holding companies.**
- 86. Restrictive sales in interstate commerce.**
- 87. No distinction as to commodities subject of contract.**

§ 72 (64). The demand for federal regulation of business combinations.—As the demonstrated incapacity of the states to regulate interstate commerce was the direct occasion for the enactment of the Interstate Commerce Law in 1887, so the anti-trust agitation following thereafter caused the demand for the exercise of the federal power in dealing with business combinations in commerce which the states were powerless to control. The distinct economic trend in industrial development, which was then manifested in the efforts to save economic waste in production and distribution by the concentration of capital in business enterprises, resulted in different forms of combinations for the restriction of competition in business, which aroused public hostility and led to the enactment by many states of anti-trust laws more or less drastic, prohibiting all combinations in restraint of competition. Such laws, however, proved inadequate, as they could have no extra-territorial operation beyond state lines, and the freedom of commerce secured under the constitution of the United States precluded the states from excluding “trust-made” goods im-

ported from other states. Public opinion, which has found frequent expression in judicial opinions, was firmly convinced that the repression of competition tended to monopoly, and that the control of production and prices by the elimination of competition in any industry was dangerous to the public welfare. It was recognized that the control of prices could be exercised not merely in raising, but also at certain times in certain localities in unduly depressing them so as to crush competitors by underselling. The evil aimed at was the unregulated power of control over industries resulting from the successful elimination of competition through the extension of the principle of business association.

This agitation in congress and out of it resulted in the passage of the so-called Sherman Anti-Trust Act, which was approved July 2, 1890.¹

¹ In the Standard Oil opinion, the supreme court said that the debates in congress conclusively showed that the main cause which led to the legislation was the thought that it was required by the economic condition of the times; that is, the vast accumulation of wealth in the hands of corporations and individuals, the enormous development of corporations, the facility of combination which such organizations afforded, the thought that the facility was being used and that combinations known as "Trusts" were being multiplied, and the widespread impression that their power had been or would be exerted to suppress individuals and to injure the public generally. The court added that although opinions could not be used as a means for interpreting the statute, as had been held in the Trans-Missouri Freight Association case, 166 U. S. 318, 41 L. Ed. 1007 (1897), that rule in the nature of things is not vio-

lated by resorting to debates as a means of ascertaining the environment at the time of the enactment of the particular law; that is, the history of the period when it was adopted.

Hon. William B. Hornblower, in his annual address before the Am. Bar Ass'n, 1911, on Anti-Trust Legislation and Litigation, said:

"The word 'trust' acquired an unenviable prominence in the eighties and became the familiar and common expression for a combination of competing interests under one management. To-day and for many years past, the so-called trust in its original sense has become rare, but the expression survives and has assumed a generic significance as indicating and connoting every form of combination of competing interests. The original trust arrangement was, as will be remembered, an arrangement whereby a number of competing manufacturers, individual or corporate, while retaining their

§ 73 (65). **The Anti-Trust Act of 1890.**—This act, which was entitled “An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies,” declared illegal and criminal, punishable by fine or imprisonment or both, every contract or combination, in the form of trust or otherwise, or conspiracy in restraint of trade and commerce among the several states or with foreign nations, and any monopolizing or attempt to monopolize any part of trade or commerce among the states. The act provided penalties for its violation, included contracts in any territory or the district of Columbia, provided for seizure and condemnation of property in the course of transportation owned under any contract made in violation of the act, and gave the right of action to private persons injured by such combinations with three-fold damages, and a summary procedure in equity at the suit of the United States to prevent and restrain violations of the act.¹

individual or corporate identity and their individual or corporate ownership of their respective properties, put into the hands of trustees their respective interests, the trustees being clothed with the right to dictate to the respective competitors the terms on which they should compete, the amount and character of their output and the prices at which the output should be sold. The term ‘trust’ soon became a term of opprobrium and has so remained. The large combinations of capital which now exist in various branches of industry have inherited the opprobrium attaching to this term. To call a combination or a corporation a trust is to excite public condemnation and to put the combination or the corporation on the defensive.”

¹ See *infra*, § 432 *et seq.*, for the act in full, with the judicial construction and application of the several provisions.

The Tariff Act of 1894 contained substantially the same prohibition, of combinations, conspiracies, trusts and agreements in restraint of trade or free competition in lawful trade or commerce, or to increase the market price in any part of the United States for an article imported or intended to be imported into the United States or of any manufacture in which such imported article enters or is intended to enter. Penalties were imposed and the circuit court vested with jurisdiction to prevent and restrain such violation. Provision was also made for the forfeiture of property owned by any such combination and for a private right of action with three-fold damages and reasonable attorney’s fee to any party injured thereby. These sections were continued in force by the Tariff Act of 1897 (see 2nd Comp. Stat. p. 1702), were not repealed by the Tariff Act of August 5th, 1909, known as

§ 74 (66). Restraint of trade in interstate commerce under the common law.—This act of 1890, the supreme court has definitely decided in the Standard Oil and Tobacco cases, must be construed with reference to the common law of interstate commerce, as recognized and enforced at the time of its enactment. Contracts in interstate commerce and subject as such to the regulating power of congress, in the absence of congressional regulation, are controlled by the rules of the common law.¹

There are no common-law crimes in the United States, and common-law contracts in restraint of trade, that is in general restraint of trade, are not illegal except in the sense that the law will not enforce them. "It does not prohibit the making of such contracts; it merely declines after they have been made to recognize their validity."²

This statute of 1890, therefore, enforces rather than changes the common law, in that it makes contracts in restraint of trade in interstate commerce both illegal and criminal.

It was declared by the supreme court however in the Debs case,³ that the power of the national government over interstate commerce and its right to invoke the power of the courts to remove any obstructions to such commerce did not depend upon the statute of 1890, but on the broader ground of the attributes of sovereignty possessed by the government within the limit of its enumerated powers. The national government was therefore empowered, irrespective of the statute, to protect interstate commerce and the right of the citizens to freely engage therein against injurious combinations in

the Payne-Aldrich Act, and are therefore still in force. (See Secs. 73, 77, 3rd Comp. Stat. 3202.)

¹ See *Western Union Tel. Co. v. Call*, § 46, *supra*.

It was said by the court in the Standard Oil Case that the debates showed the doubt as to whether there was a common law of the United States which governed the subject which in the absence of legislation was among the influences leading to the passage of the act. There had been

diverse rulings in the circuit courts, but it was not definitely decided by the supreme court until 1901 that interstate commercial transactions were subject to the rules of the common law except so far as they were modified by congressional enactment.

² Lord Bowen in *Mogul Steamship Co. v. Macgregor*, 23 Q. B. Div. 598 (1889).

³ 158 U. S. 564, 39 L. Ed. 1092 (1895).

restraint of trade or monopolies, and to invoke the powers of a court of equity for that purpose. It seems also that there is a jurisdiction in equity irrespective of the statute, which may be invoked by private citizens on general principles of equity jurisprudence, to afford preventive relief against threatened injury from any unlawful agreement combination or conspiracy in restraint of trade in interstate commerce.¹

It would therefore follow that without the statute of 1890, or if that statute was repealed, the public interests and private property rights could be protected by the civil courts against injurious combinations in interstate commerce.

§ 75 (67). **Constitutionality of the act.**—The constitutionality of the Anti-Trust Act has been sustained by the supreme court. Even under its early construction in the Freight Association cases, that it not only enforced the common law but created a new rule of action, the act was adjudged not violative of the freedom of contract guaranteed by the fifth amendment of the constitution of the United States.² The court said that notwithstanding the general liberty of contract possessed by citizens under the constitution, there were many kinds of contracts which were not in themselves immoral or *mala in se*, which may yet be prohibited by the legislatures in the states, or in certain cases by congress. The power existed in congress and the statute was the legitimate exercise of the power of congress to regulate interstate commerce, and the question for the court was one of power only and not of policy, as the latter was the one determined by congress.

Under the later construction of the act,³ whereunder it is brought in harmony with the common law and enforces rather than changes the common law of restraint of trade, any possible question of the validity of the statute is removed, as its whole purpose is directed to the protection of the individual freedom of contract.

¹ See *Gulf, Colo. & S. F. R. Co. v. Miami S. S. Co.*, Fifth Circuit Court of Appeals, 30 C. C. A. 142, L. c. 156, and 86 Fed. 407, decided in 1898; see *supra*, § 43.

1898, and 43 L. Ed. 259; and *Adyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. Ed. 136, decided in 1899.

² See *United States v. Joint Traffic Association*, 171 U. S. 505,

³ See *Standard Oil Case*, 221 U. S. 1, 55 L. Ed. — (1911).

§ 76. Railroads included in the act.—The first important enforcement of the act was in relation to the Railroad Freight Associations, in 1897 and 1899.¹ It was strongly urged that the act did not apply to railroads as they were not named therein and the combinations of railroads had been specifically regulated by the Interstate Commerce Act. It was further urged that one house of congress had refused to include the railroads in the act. This question was presented to the court before the amendments of the Interstate Commerce Act had made effective the public regulation of the reasonableness of rates, and after the decision in the Knight case,² which had created grave doubts as to the efficacy of the act in the control of monopolies in the manufacturing industries in the states. It was also claimed in these railroad cases that the associations were only for the purpose of securing a reasonable stability in rates and that the act of 1890 had no application to other than an unreasonable restraint upon trade.

The court, however, held that transportation was commerce, that the Interstate Commerce Act and Anti-Trust Act were not inconsistent, that both statutes could stand together, and that railroads were therefore included in the Anti-Trust Act.

In the later of these cases, that of the Northern Securities Company,³ it was held, four judges dissenting, and Justice Brewer concurring in a separate opinion, that a New Jersey corporation organized as a "holding company" to hold the shares of competing interstate railroads, was an illegal combination in restraint of interstate commerce.

Although the construction of the act adopted in the prevailing opinion in the two earlier of these cases has not been followed,⁴ the decision that the railroads are included in the prohibitions of the act has not been affected. It would seem from these cases, and particularly from the language of Justice Brewer in the concurring opinion in the Northern Securities case, that under any construction of the act, any combination

¹ See Freight Association cases, 166 U. S. 290, 41 L. Ed. 1007 (1897), Justices White, Shiras, Field and Gray dissenting. The Joint Traffic Association case, 171 U. S. 504, 43 L. Ed. 259 (1898).

² United States v. Knight Co., 156 U. S. 1, 39 L. Ed. 325 (1895).

³ United States v. Northern Securities Co., 193 U. S. 197, 47 L. Ed. 679 (1904).

⁴ See § 77, *infra*.

of interstate railroads resulting in the substantial suppression of competition would be violative of the act.

§ 77. A reasonable construction, and reasonable restraints of trade distinguished.—In these freight association cases, that is, in the Trans-Missouri Freight Association and the Joint Traffic Association cases, which were decided in 1897 and 1898, it was contended that the associations only aimed to secure reasonable rates, and that therefore the attempted suppression of competition and unified control was in itself not an unreasonable restraint of trade. The majority of the court, four judges dissenting, held that the prohibition of the act applied to any restraint whether reasonable or unreasonable.¹ The prevailing opinion held that the prohibition of the act was not the limit of the restraint of trade as it was understood at common law, but applied to any restraint whether it would be deemed reasonable or unreasonable at common law.

In the later case of the Northern Securities Company, decided in 1904, Justice Brewer, who had concurred in the prevailing opinion of the Freight Association cases, filed a concurring opinion,² wherein he said that while his conviction was not disturbed that the former cases were correctly de-

¹ Justice White filed a dissenting opinion (Justices Field, Gray and Shiras concurring), saying, "There can be no doubt that reasonable contracts cannot be embraced within the provisions of the statute if it be interpreted by the light of the supreme rule commanding that the intention of the law must be carried out, and it must be so construed as to afford the remedy and frustrate the wrong contemplated by its enactment.

"The plain intention of the law was to protect the liberty of contract and freedom of trade. Will this intention not be frustrated by a construction which, if it does not destroy, at least gravely impairs,

both the liberty of the individual to contract and the freedom of trade? If the rule of reason no longer determines the right of the individual to contract and secures the validity of contracts upon which trade depends and results, what becomes of the liberty of the citizens or the freedom of trade? Secured no longer by the law of reason, all these rights become subject, when questioned, to the mere caprice of judicial authority. Thus, a law in favor of freedom of contract, it seems to me, is so interpreted as to gravely impair that freedom."

² Four judges dissented, so that his concurrence was necessary to constitute a majority of the court.

cided, he thought that in some respects the reasons given for the judgment could not be sustained; and that instead of holding that the Anti-Trust Act included all contracts in restraint of interstate trade, reasonable or unreasonable, the ruling should have been that the contracts there presented were unreasonable contracts in restraint of trade, and as such within the scope of the act. He added that the act was leveled at only unlawful restraints and monopolies. Congress did not intend to reach and destroy those minor contracts in partial restraint of trade which a long course of decisions at common law had stamped as reasonable and ought to be upheld; the purpose rather was to place the statutory prohibition with prescribed penalties and remedies upon those contracts which were in direct restraint of trade, unreasonable and against public policy.

In the recent Standard Oil and Tobacco cases (1911), this construction of the act favored by Justice Brewer has been in effect adopted by the court.¹ That is, the act is to be construed in view of the common law as to restraints of trade, and the "rule of reason" is applied in determining, as in all other judicial controversies, the application of the law, as declared in the statute, to the facts of the contract or combination involved.

It seems a clear misconception of the rule declared in these decisions to infer that a direct restraint upon the freedom of interstate commerce, or an attempt to monopolize interstate commerce, can be reasonable in any sense. "Reason is the life of the law," said Lord Coke. "Nay, the common law itself is nothing but reason."²

¹ Justice Harlan dissenting.

² The ruling or dictum of the court in the Freight Association Cases as to the construction of the statute in this respect must be considered definitely overruled by the decisions in the Standard Oil and Tobacco Cases. Thus in the Standard Oil case the court said: "And in order not in the slightest degree to be wanting in frankness, we say in so far, however, as

by separating the language used in the opinions in the Freight Association and Joint Traffic Cases from the contest and the subject and the parties with which the cases were concerned, it may be conceived that the language referred to conflicts with the construction which we give the statute, they are necessarily now limited and qualified."

In the American Tobacco case,¹ the court said, quoting from the Joint Traffic Association case,² that the act of congress must have a reasonable construction or else there would scarcely be an agreement or contract between business men that could not be said to have, directly or remotely, some bearing on interstate commerce which possibly would restrain it. The court said further, "applying the rule of reason to the construction of the statute which was held in the Standard Oil case, that as the words restraint of trade at common law and in the law of this country at the time of the adoption of the Anti-Trust Act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interest by unduly restricting competition, or unduly obstructing the due course of trade, or which either because of their inherent nature and effect, or because of the evident purpose, etc., injuriously restrained trade,—that the words so used in the statute were designed to have and did have but a like significance." It was therefore pointed out that the statute did not forbid or restrain the power to make normal and usual contracts, or to further trade by resorting to all normal methods by agreements or otherwise to accomplish such purpose.

§ 78. Direct and incidental restraint of trade.—The application of the light of reason to the determination of whether a contract or combination is in restraint of trade in interstate commerce, does not mean any more than it did at common law, that such determination is left to any arbitrary discretion of the courts, or to any paternal discrimination between good and bad trusts. On the contrary, it has been uniformly held that there is a clear and sharp line of distinction between the restraints which are direct and those which are incidental to the exercise of a lawful contract. Thus while the act has been construed to include combinations where the direct, immediate and intended effect is for the suppression of competition in interstate business,³ it does not include agreements and regulations, which are nothing more than

¹ 221 U. S. 106, 55 L. Ed. — (1911).

² 171 U. S. 505, 43 L. Ed. 259 (1898).

³ Addyston Pipe & Steel Co. v.

United States, 175 U. S. 211 (1899), 44 L. Ed. 139; *Montague v. Lowry*, 193 U. S. 38 (1904), 48 L. Ed. 608.

charges for local facilities provided for the transaction of commerce and which only incidentally affect interstate commerce.¹ It is not restraint of trade of itself that is made illegal by the statute, as that may be the incidental effect of a valid agreement or contract; but it is the making of the contract which is or is intended to be directly in restraint of trade.²

The distinction is illustrated in the cases cited. In the Addyston Pipe case, there was a contract agreement for the restraint of trade. In the Stock Yards case, there was a restraint of trade resulting indirectly from the exercise by the defendants of their lawful rights in business associations. The former was therefore obnoxious to the act, while the latter was not. In the Standard Oil and Tobacco cases, there was a finding that upon the facts in evidence that there was a direct combination for the purpose of crushing competition and monopolizing the market.

The distinction between direct and incidental restraint of trade was very lucidly shown by Judge Taft, then on the circuit bench, in the opinion of the court of appeals in the sixth circuit in the Addyston Pipe & Steel Company case,³ in this: In holding that the contract in question was violative of the act and was also unenforceable at common law, and he laid down the rule that no contractual restraint of trade was enforceable at common law, unless it was merely ancillary to some lawful contract involving some such relation as vendor and vendee, partnership, employer and employe, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the damages of unjust acts by the other parties. The main purpose of the

¹ Hopkins v. United States, 171 U. S. 578, 43 L. Ed. 290 (1898); Anderson v. United States, 171 U. S. 604 (1898), 43 L. Ed. 300.

² In the opinion of Attorney-General Griggs to the Interstate Com. Com. of December 30, 1899, (Reports of Commission for 1899, page 16), it is said that the consultation of the representatives of interstate railroads in committee concerning the changes in classi-

fication, and subsequent independent action by the railroad companies in the adoption of a new classification recommended by the committee, where there is no evidence that any railroad company acted under compulsion of a combination, does not show a combination or conspiracy within the meaning of the act.

³ 29 C. C. A. 141, 85 Fed. 271 (1898).

contracts suggests the measure of the protection needed and furnishes a sufficiently uniform standard for determining the reasonableness and validity of the restraint. But where the object of both parties in making the contract is merely to restrain competition and enhance and maintain prices, the contract is void and unreasonable, and where made in interstate commerce is violative of the act of 1890.¹

The suggestion, therefore, that the construction of the act in the Standard Oil and Tobacco cases means the emasculation of the act and its subjection to the arbitrary discretion of the courts, seems clearly unfounded. Whether the act only enforced the common law as to undue restraint of trade, or laid down a new rule, that all restraints of trade in interstate commerce were prohibited, under either construction the courts would be compelled to determine in each case, whether the combination in question involved a direct or an incidental interference with interstate commerce. In view of the fact that the adjudged cases show that the courts have been compelled to give the act a reasonable construction, as was said in the Joint Traffic case, it would seem that the distinction between the earlier and the later construction of the act is academic rather than practical.²

In so far as a definite formulation of this distinction between direct and incidental restraint of trade can be made, in view of the infinite complexity of business associations and transactions, it may be said that a business contract, directly affecting interstate commerce, which would be unenforcible at common law as in restraint of trade and therefore against public policy, whatever the subject, would be violative of the Anti-Trust Act and subject to its penalties.¹ On the other

¹ In this Addyston Pipe case there was an allotment of territory comprising a large part of the United States among a number of companies engaged in the manufacture of iron pipe; and in that territory competition was eliminated through the allotment of territory, and through a system of pretended bids, giving the appearance of active competition at public lettings, when there was none.

² See cases wherein act has been construed and applied. *Infra.* part II, § —. As to enforcement of criminal provision of act, see *supra*, § 455 *et seq.* See also address of Hon. William B. Hornblower of New York, before Am. Bar Ass'n, 1911, containing a clear and exhaustive analysis of these decisions of the supreme court.

hand a business contract relating to interstate commerce, whatever its subject, which would be valid and enforceable at common law as imposing only a reasonable restraint, and as ancillary to a valid contract or valid business purpose, would not be violative of the Federal Act.

§ 79. **Suppression of competition must be substantial to be a "restraint of trade."**—Not only must the suppression of competition be direct, and not merely incidental to a lawful contract, but it must be substantial in character, and must be a direct and immediate effect of the transaction complained of, in order to constitute a restraint of trade or combination or conspiracy condemned by the act. This principle was illustrated in the so-called Union Pacific and Southern Pacific merger case, wherein the government claimed that the purchase of the Union Pacific Railroad of some forty-six per cent. of the stock of the Southern Pacific was an unlawful combination in restraint of trade violative of the Anti-Trust Act. The circuit judges of the eighth circuit in an opinion by Judge Adams¹ said that the direct competitive business of the Union Pacific and Southern Pacific was too insignificant to sustain the charge and that the proof showed that the immediate and actuating intent of the Union Pacific Company in requiring the control of the operation of the Southern Pacific was to secure the permanent working and reliable combination at Ogden over the existing road of the Southern Pacific to the Pacific coast for its through traffic.

The court said, the suppression of competition in this infinitesimal small proportion of the business of both companies was not a substantial or natural consequence and did not amount to a direct or substantial restraint of interstate or international commerce.

The principle thus declared, that interference with interstate commerce must be substantial, was declared by the supreme court in the Packet Company Case.² The court said

¹ See opinion of circuit judges of Third circuit, June, 1911, applying the Standard Oil and Tobacco decisions in Powder Trust case, 188 Fed. 127. See *infra*, § 448.

² United States v. Union Pacific

R. R. et al., 188 Fed. 192 (June, 1911), Justices Sanborn and Vandeverer concurring, Hook, J., dissenting.

³ Cincinnati, etc., Packet Co. v. Day, 200 U. S. 179, 50 L. Ed. 428 (1906).

that the interference, if any, with interstate commerce contemplated by a contract for the sale of certain river craft which permitted a suspension of payment of installments of the purchase price in case of serious competition in the freight and passenger traffic over a route between two named Ohio ports on the Ohio river, and required the vendors to withdraw from such competition for five years, was too insignificant to render the contract invalid under the Anti-Trust Act. The court said it will accomplish no public purpose but simply would provide a loophole of escape for persons inclined to elude performance of their undertakings, if the sale of a business and temporary withdrawal of the seller necessary in order to give the sale effect, were declared illegal in every case wherein a nice scrutiny would discover that the covenant possibly might reach beyond the state line.

§ 80. The modern law of restraint of trade.—The modern law of restraint of trade has materially modified the earlier doctrines of the common law in its adaptation to modern conditions. The world has grown distinctly smaller through the forces of steam and electricity, and the earlier doctrines of the common law have been modified accordingly. The validity of a contract, therefore, under the rules of the English as well as the American courts, is to test the validity of a contract by its reasonableness in view of all the circumstances of the case, irrespective of any arbitrary rule as to time or place. Thus it was said by the supreme court,¹ that the public interest is still the first consideration. To sustain a restraint, said the court, it must be found to be reasonable both with respect to the public and to the parties, and that it is limited to what is fairly necessary in the circumstances of the particular case for the protection of the covenantee. Otherwise, restraints of trade are void as against public policy. In an earlier case it was said² that the decision in *Mitchell v. Reynolds*, 1 P. Wms. 181, is the foundation rule in relation to the invalidity of contracts in restraint of trade; but it was made under a condition of things and a state of society different from those which now

¹ *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U. S. 373, 55 L. Ed. — (1911).

² *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396, 32 L. Ed. 979 (1889).

prevail, and the rule laid down is not regarded as inflexible and has been considerably modified. The public welfare is first considered, and if that be not involved, and the restraint upon one party is not greater than the protection of the other party requires, the contract may be sustained. The question is as to whether under particular circumstances of the case and the nature of the particular contract involved the contract is or is not unreasonable.

§ 81. **Illegal combinations in interstate commerce.**—A commodity may be the subject of an illegal agreement in restraint of trade, in violation of the act, although it is still subject to the taxing power of a state.¹

A combination is subject to the act which includes the suppression of competition in the purchase of cattle in different states, and also the suppression of competition in the sale of meats in different states, where all these acts were part of a single purpose to control and monopolize commerce. Commerce between the states, the court said, was not a technical legal conception, but a practical one drawn from the course of business. When cattle are sent for sale from a place in one state with the expectation that they will end their transit after purchase in another, and when in effect they do so with only the necessary interruption to find a purchaser at the stock-yards, and when this is the typical and constantly recurring course, the current thus existing is a current of commerce among the states, and the purchase of the cattle is a part and incident of such commerce.² The court could not order the defendants to compete, but it could enjoin them from combining not to compete.

Where the necessary effect of a combination is to stifle or directly or substantially to restrict competition in interstate commerce it is unlawful under the act; but if the necessary

¹ *Addyston Pipe & S. Co. v. United States*, *supra*; *United States v. Swift*, 122 Fed. 529 (1903).

² *Swift v. United States*, 196 U. S. 375, 49 L. Ed. 518 (1906). In this case the facts charged in the

petition were in effect confessed by the demurrer whereon the injunction was granted. The practical difficulty of proving an agreement not to compete from the fact of non-competition was not presented.

effect is but incidental and indirectly to restrict competition while its chief result is to foster the trade and increase the business of those who make and operate it, it is not in violation of the act. A combination between a corporation and its officer or agent in violation of the Anti-Trust Act, cannot be formed by the thoughts or acts of the officer or agent alone without the conscious participation in it of any other officer or agent of the corporation, as a union of two or more minds is indispensable to an unlawful combination.¹

§ 82. Complete suppression of competition not essential.—Where a contract is for the direct suppression of competition, such as was shown in the Addyston Pipe case, it is not necessary that the trade in the commodity be completely suppressed in order to render the combination one in restraint of trade. It is sufficient if the contract operates in restraint of trade.²

In determining whether an association of manufacturers or dealers constitutes a combination in restraint of trade in interstate commerce, the court will consider the whole agreement in all its provisions. Thus an agreement between the manufacturers of tiles not to sell unset tiles to any one other than members at less than the list prices, which were fifty per cent. higher than the prices to members, and membership was dependent on conditions, one of which was the carrying of at least three thousand dollars worth of stock, was held to constitute part of a scheme involving the enhancement of prices, and that the whole thing was so bound together that the transactions within the state were inseparable and became part of a scheme which really amounted to and was a combination in restraint of trade in interstate commerce.³

It is not necessary, however, that a combination should by its terms refer to interstate commerce, and it is enough if its purposes and effect are necessarily to restrain such commerce.

¹ A contract which one company makes with another to be its sole agent for the sale of its products, is not in violation of the act. *Virtou v. Creamery Package Mfg. Co.*, C. C. A. 8th Circuit, 179 Fed. 115 (1910); *Union Pacific*

Coal Co. v. U. S., 173 Fed. 737, C. C. A. 8th Circuit (1909).

² See *Addyston Pipe case*, *supra*.

³ *Montague v. Lowry*, 193 U. S. 38, 48 L. Ed. 608.

If it were otherwise, all combinations in restraint of interstate commerce could be so expressed in words as to avoid the statute.¹

§ 83 (72). Monopoly within the meaning of the act.—The second section of the act makes unlawful and punishable the monopolizing or attempting to monopolize, or combining or conspiring to monopolize any part of trade or commerce among the several states.

This section has been extensively discussed. Thus it was early said in a decision by Justice Jackson, then circuit judge and afterwards of the supreme bench,² that it was very certain that congress did not by this enactment attempt to limit the amount of property that a private citizen might acquire by legitimate and lawful methods. In other words, that it was not the magnitude of the business, but the abuses with the incidental and direct powers thereby acquired which constitutes a monopoly or attempt to monopolize.

The difficulty in the construction of this section grew out of the legal meaning of the term "Monopoly," which was a "grant of exclusive right from the sovereign power."³ In the legal sense, therefore, there must be an exclusive right or privilege on one side and a restriction or restraint on the other which operates to prevent the exercise of the right or liberty open to the public before a monopoly is secured.

The meaning of the second section was exhaustively discussed by the supreme court in the Standard Oil case.⁴ The court there said that nowhere at common law could there be found a prohibition against the creation of a monopoly by an individual; that is, monopoly in the concrete could only arise from the act of the sovereign power, and such sovereign power being restrained, prohibitions as against individuals were not directed against the creation of monopoly, but only applied to such acts in relation to particular subjects as to which it

¹ Gibbs v. McNealy, 55 C. C. A. 70, 118 Fed. Rep. 120 (1902).

² In re Green, 52 Fed Rep. 104 (1892); citing Morgul Steamship Co. v. Macgregor, App. Cases, part 1, p. 25.

³ 4th Blackstone, 159; Case of Monopolies (1601), 11 Coke Reps. 84 B; Habits of Monopolies (1623), 21 Jas. I, C. 3.

⁴ See *supra*, § 77.

was deemed if not restrained, some of the consequences of monopoly might result. The word "monopolize" was therefore used in this section in order to reach every act bringing about the prohibited results. Any ambiguity in the term was therefore dissipated in the light of the previous history of the law of restraint of trade and the indication which it gives of the practical evolution by which monopoly and the acts which produce the same results as monopoly, that is, the undue restraint of the due course of trade, all come to be spoken of as and to be indeed synonymous with restraint of trade. The court said further that when the second section is thus harmonized with and intended to be a complement of the first, it becomes obvious that the criterion to be resorted to in any given case for the purpose of ascertaining whether violation of the section has been created, is the rule of reason guided by the established law, and by the plain duty to enforce the prohibitions of the act, and thus the public policy which its restrictions were obviously intended to subserve.

It therefore follows that while monopoly in this country, in the strict legal sense, can only be possible in case of rights under patent and copyright laws, in this second section of the act of 1890 the term is used in the sense of attempting to obtain a control of the market and the suppression of competition through unlawful means, that is, through restraint of trade. This is substantially the construction given this section in the different circuit courts and the courts of appeal. Thus it was said by the circuit court of appeals of the eighth circuit,¹ that the purpose of the second section was the same as that of the first, to prevent the restriction of competition, and should receive the same interpretation. It was not the purpose of the second section to prohibit and punish the customary and universal attempts of all manufacturers and traders engaged in interstate commerce to monopolize a fair share of it in the necessary enlargement of their business, while their attempts left their competitors free to make successful endeavors of the same kind.

This was the same construction given to the act by Justice Jackson in the case above referred to, where it was held that the payment of rebates to parties who dealt exclusively with

¹ See *Continental Tobacco Case*, 125 Fed. Rep. 454 (1903).

the company did not constitute an attempt to monopolize, as the purchaser was left at liberty to buy where he pleased, and all other sellers of the article were left unrestrained in offering greater inducements.¹

§ 84 (75). No application to commerce within a state.—The limitation of the jurisdiction of congress to commerce among the states was illustrated in the first case presented to the court involving the construction of the act. That was the Sugar Trust case in 1895.² In this case the court held that the statute did not reach a manufacturing company which was acquiring by the purchase of the stock of other refining companies through shares of its own stock nearly complete control of the manufacture of refined sugar in the United States. The court said that manufacture precedes commerce, but is not a part of it. The sale as an incident of manufacture, therefore, was distinguished from commerce. This decision disappointed many in their anticipations of the effectiveness of the statute, and this feeling seems to have been shared by the supreme court, as it was said in the first Freight Rate case in 1897, that if the act was not applicable to railroads, there would be very little left for it to apply to. While the growth of combinations in interstate commerce has disappointed these anticipations of the ineffectiveness of the statute, the court has adhered to its ruling that it has no jurisdiction over that part of a combination or agreement which relates wholly to commerce within a state by reason of the fact that the combination also covers the regulation of commerce which is interstate.

¹ Sanborn, J., said in *United States v. Standard Oil Co.*, 173 Fed. Rep. 177 (1909): "If the necessary effect is only incidental or indirectly to restrict competition, while its chief result is to foster the trade and increase the business of those who make and operate it, it does not violate the law." Hook, J., concurring in the same case said (p. 195): "The scope of the second section contemplates the conduct of one person, but the first that of two or

more. The intention of congress was to condemn monopolies, not based on legal combinations among several, but secured by single persons, natural or artificial;" and "that the magnitude of the business does not alone constitute monopoly, and that the baneful effect is the same whether the monopoly comes as the gift of the government, or is the result of individual wrongdoing."

² *United States v. Knight Co.*, 156 U. S. 1, 39 L. Ed. 325 (1895).

This fundamental principle, which not only controls the construction of the act of July 2, 1890, but also the power of congress to enact any legislation concerning commercial combinations, was forcibly illustrated in the case of Addyston Pipe & Steel Co., *supra*. The combination in that case included both state and interstate commerce. As to such of the defendants as might reside and carry on business in the same state where the pipe provided for in any particular contract was to be delivered, the sale, transportation and delivery of the pipe by them under that contract would be a transaction wholly within the state, and the supreme court said, modifying the judgment of the circuit court of appeals in that respect, that the statute would not be applicable to them in that case. They might make any combination they choose with reference to the contract, although it happened that some non-resident of the state finally obtained it. In the language of the court, in brief, their right to combine in regard to a proposition for pipe, deliverable in their own state, could not be reached by the federal power derived from the commerce clause in the constitution. A combination violative of the act may however include a series of acts, concluded in different states, when they are part of one purpose, as in the purchase and shipment of cattle to control and monopolize commerce between the states.¹

§ 85 (76). **State holding companies.**—The Northern Securities case, *supra*, was novel in that it decided that the corporation organized under the laws of a state and empowered under its charter to hold the stock of other corporations, was prohibited by this act from holding the stock of competing interstate railroad corporations. The illegal combination was founded upon the fact of control of competing railroads in a single authority and the resulting power of direct suppression of competition through such control. Thayer, J., in the circuit court, said that a state could not invest a corporation organized under its laws to do acts in its name which operate in restraint of trade and commerce, and that the court would not consider whether a combination would be of benefit to the public; but that a corporation organized under the laws of a state to hold the stocks of competing interstate railroad companies was in violation of

¹ See Chicago Meat Trust Case, *supra*.

the Anti-Trust Act, since it destroyed any active form of competition between the two roads,¹ and it was immaterial that each company had its own board of directors.

The holding corporation was condemned in this case, not because it was a "holding corporation" merely, but because it held the stock of subsidiary corporations directly engaged in interstate commerce, and thus controlled competition as between those companies. The act, as such, has nothing to do with holding corporations, where the subsidiary corporations are not engaged as competitors directly in interstate commerce. The right of the holding corporation in other cases depends upon the authorization of its own charter and the laws of the states whereunder the subsidiary companies are organized and do business.

The organization of a holding corporation made for the purpose of controlling other companies engaged in interstate commerce, though the holding of the stocks of other companies may be duly authorized in its charter, may be the most effective means of eliminating competition and dominating an industry, and thus may be a very material factor in the determination of the fact of restraint of trade and monopolization or attempted monopolization of the market.² Thus in the Standard Oil

¹ 120 Fed. Rep. 721 (1903).

² It was said by Attorney-General Wickersham, in his Minnesota address, *supra*, . . . : "Probably no one thing has done more to facilitate restraint of trade and the growth of monopoly than a departure from the early rule of law that one corporation cannot own stock in another. That departure was the most baneful result of the 'let us alone' policy in dealing with corporations to which the country abandoned itself during the last thirty years of the nineteenth century. The conditions which have resulted from the exercise of the expressly conferred power in a corporation to take and hold stock in another, present the most serious

obstacles to the effective dealing with the trust problem." He admitted, however, that intercorporate holding was so widely prevalent that justice to the municipal holders of securities issued to the public, based on pledged stocks, acquired and held pursuant to express legal authority, "would require consideration to be given to their case and such exceptions to be made from a prohibition as might be necessary to their protection."

It seems that in some cases intercorporate holding has been directly caused by state legislation requiring local incorporation. See also report of National Securities Commission, 1911. See Appendix.

case it was held that the organization of a New Jersey company as a holding company, authorized under its charter to hold the stocks of other companies, was in itself an agency under the facts of that case in effecting unlawful restraint of trade, and its dissolution was decreed.¹ The same principle was applied in the American Tobacco case.

§ 86. Restrictive sales in interstate commerce.—The distinction between contracts directly and substantially restricting free competition and those which only incidentally and indirectly restrain trade has been illustrated in successive decisions of the circuit court of appeals of the eighth circuit, composed of three of the four judges who rendered the opinion in the circuit court in the Northern Securities case and in the Standard Oil case. Thus requirement by a manufacturer that the purchaser of his goods should refrain from dealing with his competitors, such requirement being enforced by a rebate which the purchaser could only secure by dealing solely with the sellers, was held not an unlawful restraint of trade. The court said that the seller had the right to sell his commodities at any price, and to fix the prices and terms upon which he would sell them to the persons with whom he made contracts of sale, and that he was deprived of none of these rights by the Anti-Trust Act. There was no competition between the plaintiff and the defendant, and therefore no restriction of competition by the contract.²

The same court held³ that a contract of sale by a manufacturer to jobbers of goods to be shipped across state lines to the latter, whereby the parties agreed that the jobber should not sell, ship or allow any of the goods thus purchased to be shipped outside of a certain state, was not in restraint of trade or illegal.

It was held by the same court⁴ that the organization of a

¹ See *supra*, p. 122. See also opinion of Sanborn, J., and especially the concurring opinion of Hook, J., where especial stress is laid upon the efficiency of the New Jersey holding corporation as a factor in the restraint of trade in this case.

² *Whitewell v. Continental Tobacco Co.*, 125 Fed. Rep. 454 (1903).

³ *Phillips v. Viola Portland Cement Co.*, 125 Fed Rep. 593 (1903).

⁴ *Arkansas Brokerage Co. v. Dunn*, 173 Fed. Rep. 989 (1909).

number of mercantile jobbers in the same state of a brokerage company and the purchase of merchandise required by the manufacturers through such company, instead of through other companies, although there was no agreement binding them to do so, was not an unlawful combination under the act, but a legitimate and lawful business enterprise.¹

In each of these cases it was held that it was no restraint of competition by a contract. The reasoning of the opinions in these cases excludes from the act the so-called "Factors Agreement" or any form of agreement whereby the seller seeks to control through rebates or otherwise the trade of his own customers against competitors.²

The contracts involved in these cases however must be distinguished from those wherein the manufacturer through so-called "Agency Contracts" or otherwise seeks to fix the prices for future sales made by purchasers, after he has parted with title to the property sold. This was declared in the so-called Patent Medicine case,³ where the court held that contracts between a manufacturer and all dealers, whom he permitted to sell his products, comprising most of the dealers in similar articles throughout the country, which fixes the prices for the sales whether wholesale or retail made by the dealers, operated as a restraint of trade, unlawful both at common law and as to interstate commerce under the Anti-Trust Act, even though such articles may be proprietary medicines made under secret formulae.

¹ See also *Virtue v. Creamery Package Mfg. Co.*, 179 Fed. Rep. 115 (1910).

² The same court in *Passaic Print Goods Co. v. Ely & Walker Dry Goods Co.*, 44 C. C. A. 426, and 105 Fed. Rep. 163, 62 L. R. A. 673 (1900), held that a merchant did not subject himself to liability of an action for damages to a manufacturer by sending circulars to the retail trade offering a small quantity of such manufacturer's products, which he owned, at a cut price for the purpose of destroying or injuring such manufac-

turer's trade and depressing his goods in the market, and that merchant could not be held liable for a conspiracy by offering goods of a certain manufacturer, which they owned, at a cut price for the purpose of injuring his trade or depressing the market price of his product, *Sanborn, J.*, dissenting. The court in this case discussed and applied the rule of *Allen v. Flood*, 1 A. C. (1898) 1.

³ *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U. S. 373, 55 L. Ed. — (1911), affirming 164 Fed. Rep. 803.

The same ruling has been made under the copyright statutes, although the owner of the copyright has the sole right to vend copies of the copyrighted production.¹

§ 87 (74). No distinction as to commodities subject of contract.—In the opinion of the circuit court of appeals in the Continental Tobacco Company case, *supra*, it is said that tobacco, the subject of the contract in question, was not an article of “prime necessity,” such as grain or coal. This was doubtless said in view of the recognized principle that the subject of the contract will be considered in the determination of the reasonableness of contracts in restraint of trade. The question in such cases is whether the public welfare is involved, and if not, whether under the particular circumstances of the case the restraint upon one party is not greater than the protection to the other requires.² In determining the enforcibility at common law of a contract, it might be material that it related to a subject of “prime necessity” in a restricted territory, and this might be a circumstance affecting the reasonableness of the restraint.³ This fact has also been held material in determining whether combinations are injurious to trade or commerce in the jurisdictions where the common law of conspiracy prevails.⁴

¹ *Bobbs-Merrill Co. v. Strauss*, 210 U. S. 339, 52 L. Ed. 1086 (1910). A different rule has been applied in the cases of lawful monopoly of patent rights. See *Bement & Sons v. National Harrow Co.*, 186 U. S. 206, 46 L. Ed. 1058 (1902). See *infra*, § 452.

² *Fowle v. Park*, 131 U. S. 88, 1 L. c. 97 (1889), 33 L. Ed. 67; *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396 (1888), 32 L. Ed. 979. See also *Oliver v. Gilmore*, 52 Fed. Rep. 568 (1892).

³ It was said, however, by Taft, J., in the *Addyston Pipe & Steel Co.* case, *supra*, that the cases showed that the common-law rule against restraint of trade extended to all

articles of merchandise, and that the introduction of the distinction (of articles of prime necessity) only furnished another opportunity for courts to give effect to the varying economical views of its members. It might be difficult to say why it was any more important to prevent restraints of trade in beer, mineral water, leather, or cloth, than of trade in certain shades of glue.

⁴ In *People v. Sheldon*, 139 N. Y. 251 (1893), a combination of coal dealers was held an unlawful conspiracy under a statute making it a misdemeanor to conspire to commit any act injurious to trade or commerce.

In the same connection the court referred to the fact that the contract in question was not that of a public service corporation, recognizing that in the case of such corporations there was a different standard of determining the reasonableness of contracts in alleged restraint of trade.

There is however nothing in the Anti-Trust Act of 1890 warranting the limitation of its prohibitions according to what a court may adjudge are or are not necessities of life. Tobacco and whiskey, and many other articles, may not be of such prime necessity as grain and coal, but in a complicated and progressive industrial civilization the standard of living of the masses is constantly advancing, and the comforts and even the luxuries of one generation are the necessities of another. At common law contracts in general restraint of trade are unenforcible, irrespective of the subjects of the contract, and it was only in the determination of the validity of contracts in partial restraint of trade that the subjects of the contracts were considered. Monopolies were first judicially pronounced illegal as against common right in a suit involving a royal grant of a monopoly in playing cards.¹ The mediaeval statutes long since repealed in England have never been in force in the United States in the law of interstate commerce, nor is there any common law of conspiracy in the laws of the United States.² The only federal statute relating to freedom of interstate commerce is the Anti-Trust Act. Under this statute therefore there is no basis for any distinction between articles of prime necessity and other articles. The owners of both classes of property have the same rights under the law, and are subject to the same obligations.³

¹ See case of Monopolies, 11 6 Coke Reps. Pt. 11, 84b (1601).

² See *infra*, §§ 94 *et seq.*

³ The Forestalling Statute, 25 Edward III, enacted in 1350, made criminal the forestalling of "wine and other victuals, wares and other merchandise that came to the good towns of England by land or water." The statute of Edward VI against 'regrators, forestallers and grocers' included

merchandise, victuals or any other thing whatsoever. "Cattle, sheep, grain, butter, cheese, fish, or other dead victual whatsoever," were also included. These statutes were all repealed in 1771, Act 12 George III, c. 71. The preamble to the repealing act is as follows: "Whereas, it has been found by experience that the restraints laid by several statutes upon dealing in grain, meal, flour, cattle and sun-

dry other sorts of victuals have a tendency to discourage the growth and to enhance the price of the same, which statutes if put into execution would bring great distress upon the inhabitants of many towns of this kingdom, and particularly upon the cities of London and Westminster."

In view of the ruling in *Rex v. Waddington*, 1 East, Am. Ed. 84 (1801), that the offenses had existed at common law and the repeal of the statutes was insufficient, an act was passed, 7 and 8 Victoria, c. 24, in 1844, in express terms abolishing the offenses.

CHAPTER VI.

LABOR COMBINATIONS IN INTERSTATE COMMERCE.

- § 88. The labor legislation of congress.
- 89. Regulation of interstate commerce in relation to labor.
- 90. The courts on labor combinations in relation to interstate commerce.
- 91. Interstate commerce and railroad labor organization.
- 92. Business boycotts in interstate commerce.
- 93. Strikes and boycotts by employees of interstate carriers.
- 94. The law of conspiracy in interstate commerce.
- 95. Distinguished from common-law conspiracy.
- 96. Interstate commerce in relation to employes therein.
- 97. "Picketing" and "soliciting" in interstate commerce.
- 98. The status of interstate railroad employes is that of free contract.
- 99. The right of labor organization includes the right of representation.
- 100. Injunction in interstate commerce.
- 101. Contempt in United States courts.
- 102. Direct and indirect contempts.
- 103. Criminal and civil contempts.
- 104. Conspiracy and contempt.
- 105. Mandatory injunctions in interstate commerce.

§ 88 (77). The labor legislation of congress.—The labor legislation of congress has not been limited to the relations of labor in interstate commerce, but certain features of this legislation are distinctly related to the interstate commerce relations of labor, and the provisions of both the Interstate Commerce and the Anti-Trust Acts relating to unlawful combinations in interstate commerce have been construed as applicable to labor as well as to business combinations. The general labor legislation of congress is therefore properly considered in this connection.

The bureau of labor created under the act of June 27, 1884, was made a department of labor under the act of June 13, 1888. The general design and the duties of the commissioner of labor were declared by the act "to acquire and diffuse among the people of the United States useful information on subjects connected with labor in general in the most comprehensive

sense of the word, and especially upon its relation to capital, the hours of labor, the earnings of laboring men and women, and the general means of promoting their social, intellectual and moral prosperity.”

The commissioner was charged to investigate conditions of labor, wages, cost of living, effect of customs laws, what articles were controlled by trusts, combinations of capital, and what effect trusts and other combinations of capital had on production and prices. The commissioner was also charged to investigate the cases of disputes between employes and employers.

By the act of February 14, 1903, the department of commerce and labor was established, and the department of labor made a part of this department.

§ 89 (78). Regulation of interstate commerce in relation to labor.—Congress has exercised its power of regulation in the effort to harmonize the relations of capital and labor in interstate railroads. The first legislation of this character was the act of June 29, 1886.¹ This act was not limited to the employes of carriers, but authorized the incorporation of any association of working people having two or more branches in the states or territories of the union, and the incorporation was effected by filing articles in the office of the recorder for the district of Columbia. Provision was made for the establishing of branches and sub-unions in any territory of the United states.

The act of June 1, 1898,² was entitled “An act concerning carriers engaged in interstate commerce and their employes,” and by its terms only applied to employes engaged in the railroad train service, excluding employes of street railroads. Under section 2 of this act of 1898, the chairman of the Interstate Commerce Commission and the commissioner of labor were required to put themselves in communication with the parties to a controversy between a carrier and its employes threatening to interrupt the business of the carrier, and to use

¹ Comp. Stats. p. 3204, *infra*, statute of Oct. 1, 1888, providing § 376. for boards of arbitration for settling controversies between interstate carriers and their employes.

² 3 Comp. Stats. p. 3205, *infra*, § 377. This repealed the earlier

their best efforts by mediation and conciliation to amicably adjust the same; and if these efforts were unsuccessful, to endeavor to bring about a voluntary arbitration of the controversy in accordance with the provision of the act. Provision is made in the act for such voluntary arbitration. This act also amends the National Trade Union Incorporation Act, by providing that the articles of incorporation shall set forth that any member shall cease to be such by participating in or inciting force or violence against persons or property during strikes, lockouts or boycotts, or by seeking to prevent others from working through violence, threats or intimidation.

Section 10 of this act, making it a criminal offense against the United States for an interstate carrier or agent or officer having full authority from his principal to discharge an employe from service to the carrier because of his membership in a labor organization, was adjudged invalid as violative of personal liberty and due process of law guaranteed by the fifth amendment of the constitution and on the further ground that there was no such connection between interstate commerce and membership in a labor organization as to authorize congress to make such discharge for such reason a crime against the United States.¹

The decision was held not to involve other and independent provisions of the act, such as provisions relating to arbitration, as the section upon which the defendant was convicted was separable from the other provisions of the act; so that it would seem that the provisions for voluntary arbitration referred to in the preceding section are still in force.²

¹ See *Adair v. U. S.*, 208 U. S. 161, 52 L. Ed. 436 (1908). Justices McKenna and Holmes dissented. The judgment of conviction was reversed with directions to sustain the demurrer to the indictment and dismiss the cause, reversing 152 Fed. 736.

² In the labor legislation of congress should also be included the Employer's Liability Acts and other acts for the safety of em-

ployes of interstate carriers. See *infra*, § 527 *et seq.*

Under joint resolution of sixty-first congress (Public Resolution No. 45) a commission was appointed for the purpose of making a "thorough investigation of the subject of Employer's Liability and Workmen's Compensation" to submit a report through the president to congress not later than the first Monday of December, 1911.

§ 90 (79). The courts on labor combinations in relation to interstate commerce.—As there has been no national incorporation of trade unions, there has been no judicial construction or practical application of the act. It was said, however, by Justice Harlan, in an opinion rendered in 1894,¹ with reference to the original act of 1886 legalizing the incorporation of national trade unions, that it did not in any degree sanction illegal combinations, but that its purpose in authorizing working people to better their own conditions by such combinations was most praiseworthy and should be sustained by the courts whenever their power to that end was properly invoked.

An agreement for arbitration between an interstate carrier and its employes under the act of 1908, is essentially a common-law arbitration and rests solely on the written agreement of arbitration entered into between the parties, which limits and determines not only the rights of the parties thereto but also the extent of the power of the arbitrators, and is to be construed in accordance with the rules governing the construction of contracts rather than those applicable to pleadings.²

§ 91. Interstate commerce and labor organizations.—While the jurisdiction of the federal courts has frequently been invoked in cases of trade disputes between the employers and employes where the jurisdiction is based upon diverse citizenship and no federal question is involved therein, the questions in relation to interstate commerce have usually been presented in cases involving the contentions of interstate carriers with their employes.³

¹ *Arthur v. Oakes*, *infra*.

² In *re Southern Pacific Co.*, C. C. Eastern District Cal., 155 Fed. 1001 (1907), ruling on exception to award of arbitrators under this act.

In *Wabash R. R. Co. v. Hannihan*, 121 Fed. 536 (1903), Judge Adams, in dissolving the injunction against railroad employes, expressed the hope that the parties, if unable to adjust their differences, would submit the questions

in dispute to the Board of Arbitration provided by this act.

An attempt was made in England in 1824 (5 Geo. IV, c. 96), and again in 1867 (30, 31 Vic., c. 105), and in 1872 (35, 36 Vic., c. 46), to provide for settlements of trade disputes. The acts were not used and were finally replaced by the Conciliation Act of 1896 (59, 60 Vic., c. 30).

³ *Southern Ry. Co. v. Machinists Local Union*, 111 Fed. Rep. 49

Railroad labor organizations have been considered in the judicial construction and application of both the Interstate Commerce Act of 1887 and the Anti-Trust Act of 1890. In the industrial disturbances of 1893 and 1894 there were a number of injunctions sued out in the different circuit courts enjoining interference with interstate commerce, some of these by railroad companies enjoining interference with the interchange of traffic with connecting railroads;¹ some by receivers of railroads applying for protection against interference with their possession and operation,² and also in direct suits by the United States under the provisions of the Anti-Trust Act enjoining unlawful interference with interstate commerce and the mails.³

It was held in these cases that the Anti-Trust Act was applicable to any combinations restraining trade, whether of labor or of capital,⁴ and that the penalties prescribed by sec. 10

(West. Dist. of Tenn. 1901); *Allis-Chalmers Co. v. Reliable Lodge*, 111 Fed. Rep. 264 (1901); *Elder v. Whiteside*, 72 Fed. Rep. 724 (La. 1895); *Consolidated Steel & Wire Co. v. Murray*, 80 Fed. Rep. 811 (1897); *Makall v. Ratchford*, 82 Fed. Rep. 41 (W. Va. 1897); *Coeur d'Alene Consolidated Mining Co. v. Miners Union*, 51 Fed. Rep. 260 (Idaho, 1892); *American Steel & Wire Co. v. Wire Drawers, etc.*, 90 Fed. Rep. 608 (No. Dist. of Tenn. 1898); *United States v. Weber*, 114 Fed. Rep. 950 (West. Dist. of Va. 1902); *Otis Steel Co. v. Local Union*; No. 18, 110 Fed. Rep. 698 (1901); *Hopkins v. Oxley Stave Co.*, 28 C. C. A. 99, 83 Fed. Rep. 912 (1897), affirming 72 Fed. Rep. 695; *The Allis-Chalmers Co. v. Iron Molders Union*, 150 Fed. 155, C. C. of Wis. (1906), decree modified in C. C. A., 7th Circuit, 166 Fed. Rep. 45 (1908); *Barnes v. Berry*, 156 Fed. Rep. 72, C. C., S. D. of Ohio (1907); *Delaware & W. R. Co. v. Switchmen's Union, et al.*, 158 Fed.

541 (1907); *Kolley v. Robinson* (C. C. A. 8th Cir.), 187 Fed. 415 (1911).

¹ *Toledo, A. A. & N. R. Co. v. Penn. Co. et al.*, 54 Fed. Rep. 730 (1893) (Taft, J., in Northern Dist. of Ohio); see also 54 Fed. Rep. 746 (1898); *Southern Cal. R. Co. v. Rutherford*, 62 Fed. Rep. 796 (1894) (So. Dist. of Cal.).

² *Thomas v. C., N. O. & T. P. R. Co.*, 62 Fed. Rep. 803 (1894) (Taft, J., in Southern District of Ohio).

³ *United States v. Workingmen's Amalgamated Council*, 54 Fed. Rep. 994 (Dist. of La.) (1893); *United States v. Elliot*, 64 Fed. Rep. 27 (1894) (West. Dist. of Mo.); *United States v. Agler*, 62 Fed. Rep. 826 (Dist. of Ind.) (1894); *Charge to Grand Jury, Grosscup, J.*, 62 Fed. Rep. 828 (1894); *Ross, J.*, 62 Fed. Rep. 834; *Waterhouse v. Comer*, 55 Fed. Rep. 149 (S. Dist. of Ga.), (1893).

⁴ See authorities, *supra*, and *In re Debs*, 64 Fed. Rep. 724 (1894). In *United States v. Cassidy*, 67 Fed. Rep. 698 (1895), it was held

of the Interstate Commerce Act were applicable to the employes of an interstate railroad who, while continuing in their positions as employes, refused to handle the freight received from other roads. Such refusal, when made in consequence of a boycott declared by their union against such road, was an unlawful conspiracy and punishable as such under the laws of the United States, and also punishable as a contempt when their employing road was under an injunction prohibiting it from refusing to exchange interstate traffic with such boycotted road.

The supreme court, in the Debs case,¹ while not dissenting from the conclusion of the circuit court in holding the Anti-Trust Act applicable to a labor combination interfering with interstate commerce, affirmed the jurisdiction of the federal court to grant an injunction against such interference on the broader ground of the federal power over interstate commerce, which included the power to remove anything put upon the highways, natural or artificial, to obstruct the passage of such commerce, and that this federal power was enforceable by injunction.

§ 92. Business boycotts in interstate commerce.—The Anti-Trust Act has also been held applicable to labor combinations other than the employes of interstate carriers, and it has been held by the supreme court² that any combination which essentially obstructs the free flow of commerce among the states and restricts in that regard the liberty of a trader engaged in business is violative of the act, and the averments of a petition setting forth such a combination destroying by means of a boycott an existing interstate business, and preventing vendees in other states from reselling the manufactured products

that the provisions of the Anti-Trust Law were broad enough to reach the combination or conspiracy that would interrupt the transportation of property or persons from one state to another.

¹ 158 U. S. 564, 1 c. 600, 39 L. Ed. 1092 (1894).

² This was what is known as the Danbury Hat case, *Loewe v.*

Lawlor, 208 U. S. 274, 52 L. Ed. 488 (1908), reversing 148 Fed. Rep. 924. The question of the right of action was certified by the court of appeals of the 2nd circuit to the supreme court; and the supreme court, on the application of the parties, required the whole record to be sent up under section 6 of the Judiciary Act of 1891.

when transported, stated a cause of action for damages under the act.

The same principle was applied to a bill in equity enjoining a boycott interfering with the conduct of an interstate business.¹ The court said that it was immaterial that the instrumentalities of the boycott were spoken words or written matter. The principle announced by the court was held to apply to any unlawful combinations resulting in restraint of interstate commerce, and covered any illegal means by which interstate commerce is restrained, whether by unlawful combinations of capital or unlawful combinations of labor, and whether the restraint be occasioned by unlawful contracts, trusts, pooling arrangements, black-lists, boycotts, threats, intimidations and whether this be effected in whole or in part by acts, words or printed matter, and that the court's protective and restraining powers extended to any device whereby property is irreparably damaged or commerce is illegally restrained.

The first of these cases, the Danbury Hat case, was an action at law for recovery of damages under the seventh section of the Anti-Trust Act, and it was therefore strictly within the statute. The equity suit, however, was brought to restrain the interruption of existing business and asked no relief under the Anti-Trust Act. It was therefore sustained under the general equity jurisdiction of the court in protection of interstate commerce which existed irrespective of the Anti-Trust Act.

§ 93 (81). Strikes and boycotts by employees of interstate carriers.—The right to strike, that is to enforce demands for

¹ *Gompers v. Buck Stove & Range Co.*, 220 U. S. —, 55 L. Ed. — (May 15, 1911). The court said in its opinion as to the right to an injunction and its violation, "In the case of an unlawful conspiracy, the agreement to act in concert when the signal is published gives the words 'unfair' 'we don't patronize,' or similar expressions, a force not inhering in the words themselves and therefore exceeding any possible right of speech which a single individual might have. Under such circumstances

they become what have been called 'verbal acts,' and as much subject to injunction as the use of any other force whereby property is unlawfully damaged. When the facts in such cases warrant it, a court having jurisdiction of the parties and subject matter, has power to grant an injunction." As to entry on the contempt charge in this case see *infra*, § 103. See also as to labor controversy, *Loewe v. California State Fed. of Labor*, 139 Fed. 714 (1911).

the betterment of their own conditions by concerted ceasing from employment on the part of employes directly engaged in interstate commerce, has been uniformly sustained, but has been broadly distinguished from the right to boycott or engage in a so-called sympathy strike. The incidental interference with commerce resulting from a strike, when a body of laborers by concerted action leave their employment, does not constitute an unlawful conspiracy, nor is it violative of the Interstate Commerce Act or the Anti-Trust Act.¹ Laborers directly engaged in interstate commerce have the right, singly or in concert, to cease from their employment whenever they deem such action necessary for the betterment of their own conditions, and it is immaterial, if their demands are made in good faith for the betterment of their own conditions, that is, as to wages or other conditions of employment, whether such

¹ *Hopkins v. United States*, 171 U. S. 578, 1. c. 593, 43 L. Ed. 290 (1898). As to the lawfulness of a strike, *per se*, by railroad employes, see opinion of Hon. Richard Olney, then attorney general of the United States, in the case of the Philadelphia & Reading R. Co., in the proposed adoption of a rule by the receivers excluding members of railroad Brotherhoods from employment, printed in p. 504 of Hearings on House Bill No. 89, before the committee on the judiciary of the 58th congress. The court in this case, 65 Fed. Rep. 660 (1894), declined to direct the receivers to abrogate such a rule, which they believed was advantageous to the management of the property. But see Taft, J., in the Phelan case, *supra*, that "the employes of the receiver had the right to organize into or join a labor union which should take action as to the terms of their employment. It is a benefit to them and to the public that laborers should unite for their common interest and for lawful

purposes. They have labor to sell. If they stand together they are often able, all of them, to command better prices for their labor than all dealing singly with rich employers, because the necessities of the single employe may compel him to accept any prices that are offered. The accumulation of a fund for those who feel that the wages offered are below the legitimate market value of such labor is desirable. They have the right to appoint officers who shall advise them as to the course to be taken in their relations with their employers. They may unite with other unions. The officers they appoint, or any other person whom they choose to listen to, may advise them as to the proper course to be taken, both in regard to their common employment, or if they choose to appoint any one, may order them, on pain of expulsion from their union, peacefully to leave the employ of their employer because any of the terms of their employment are unsatisfactory."

demands are reasonable or unreasonable, provided of course that they act within the limit of their lawful rights, and do not interfere with those who continue in the employment or who are employed to take their places; that is, within these limits they have the same right with others to determine the reasonableness of their own demands for the betterment of their own conditions.

On the other hand, a boycott, or a sympathetic strike, that is the ceasing from employment, not for the purpose of bettering their own conditions, but for the purpose of enforcing the employing company to refuse traffic from a connecting carrier, or to refuse to handle some boycotted traffic, is unlawful. It was said by Judge Taft,¹ in speaking of the attempted boycott of the Pullman cars, that it was immaterial that such boycott was unaccompanied by violence or intimidation.

“The purpose, shortly stated, was to starve the railroad companies and the public into compelling Pullman to do something which they had no lawful right to compel him to do; certainly the starvation of a nation cannot be the lawful purpose of a combination, and it is utterly immaterial whether the purpose be effected by means usually lawful or otherwise.”

The distinction was drawn in another case² between a combination of the employes of the complainant railway company which was seeking an injunction from the combination of the employes of the defendant company. The court said the former was lawful, as the employes of that company were simply exercising their lawful right to cease from employment, that is, to strike, while the latter combination for the refusal of the traffic of the former was unlawful, as it involved a boycott for no grievances of their own, thus making a direct interference with interstate commerce, which was the intended result of their act, and not the incidental result of their exercise of a lawful right. It was also ruled, that a combination to compel railroad companies to break their contracts with the owners of certain cars for the use thereof was an actionable conspiracy and unlawful.

It will be observed that in these cases there was not what

¹ Thomas v. C., N. O. & T. P. R. Co., *supra*.

² Toledo, A. A. & M. R. Co. v. Pennsylvania Co., 54 Fed. Rep. 730, 1. c. 738.

is known as a simple or primary boycott, as in the case of an organized withdrawal of patronage from a trader for the purpose of injuring the business, but it was a "sympathetic strike" of the employes of one interstate carrier for the purpose of forcing a refusal of business relations with another interstate carrier in violation of law.

§ 94 (82). The law of conspiracy in interstate commerce.—The law of conspiracy has been extensively discussed in relation to the combinations of both labor and capital in interstate commerce. As there are no common-law offenses in the United States, criminal conspiracies are punishable only as such when they are distinctly declared in the laws of the United States. There are certain specific conspiracies made punishable by the statute, but the section invoked in relation to interstate commerce is what is known as the general conspiracy statute, section 5440, R. S., U. S., which is as follows: ¹

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more such parties do any act to affect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not more than ten thousand dollars, or to an imprisonment of not more than two years, or to both fine and imprisonment, in the discretion of the court."

A conspiracy was defined by the supreme court as a combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means.²

¹ Section 5440, R. S. U. S., 3 Comp. Stats., p. 3676. This statute was first enacted in 1867 as a part of the Internal Revenue Act, the penalty therein being not less than one thousand nor more than ten thousand dollars, and imprisonment for not more than two years; subsequently incorporated in the revised statutes and amended into its present form by act of May 17, 1879. It has been held to apply to all crimes under the laws of the United States. See

United States v. Sanche, 7 Fed. Rep. 715 (W. Dist. of Tenn.) (1881).

² Pettibone v. United States, 148 U. S. 197, 37 L. Ed. 419 (1892), citing Shaw, C. J., in Commonwealth v. Hunt, 4 Metcalf, 111. In this case the court quashed an indictment whereunder a conviction had been had for conspiring to obstruct the due administration of justice by intimidation and violence in a strike, on the ground that the indictment failed to show

This section has been held to include all conspiracies for affecting private rights and interests, where they are under the protection of the criminal laws of the United States as well as the rights and interests of the government itself.¹ While the offense of conspiracy is an "infamous crime" within the meaning of the fifth amendment to the constitution, requiring presentment or indictment of a grand jury,² it is yet a misdemeanor and not a felony, and an indictment is not defective by reason of failing to aver that the conspiracy was "feloniously" entered into.³ As the offense is a misdemeanor, the doctrine of merger has been held not applicable, so that an acquittal of the offense of conspiracy is not a bar to the prosecution for the crime itself.⁴

A conviction under this statute for conspiracy to obstruct the United States mails⁵ was affirmed, and the conspiracy was held to be a separate offense for which congress had power to provide a greater punishment than for the offense itself for which the conspiracy was formed.⁶

The law of conspiracy was invoked in connection with the labor disturbances of 1893 and 1894, and a number of criminal prosecutions were instituted and indictments found for criminal conspiracy to commit offenses of violation of the Interstate Commerce and Anti-Trust Acts.⁷ These statutes, as will be seen, prohibit and make criminal interferences with or combinations in restraint of trade in interstate commerce.⁸

that the defendants had notice of the pendency of proceedings in the United States courts which they were charged with combining to obstruct.

¹ United States v. Sanche, *supra*.

² Mackin v. United States, 117 U. S. 348, 29 L. Ed. 909 (1886); Callan v. Wilson, 127 U. S. 540, 32 L. Ed. 223 (1888), where held that a conspiracy at common law for alleged boycott in the District of Columbia was not triable summarily before a police magistrate, but that jury trial was demandable as a right.

³ Bannon v. United States, 156 U. S. 464, 39 L. Ed. (1895).

⁴ Berkowitz v. United States, 3rd Circuit, 35 C. C. A. 379, 93 Fed. Rep. 452 (1899).

⁵ Sec. 3995 R. S. of U. S., 3 Comp. Stat., 2716.

⁶ Clune v. United States, 159 U. S. 590, 40 L. Ed. 269 (1895).

⁷ See Charge to Grand Jury, Grosscup, J., *supra*, and Ross, J., 62 Fed. Rep. 838; United States v. Cassiday, 67 Fed. Rep. 698; In re Debs, *supra*.

⁸ As to criminal conspiracy under Anti-Trust Act, and its distinction from conspiracy under sec. 5440, see *infra*, § 457.

The subject was exhaustively discussed also in the injunction and contempt proceedings growing out of the same disturbances. The law of conspiracy has been applied in determining the responsibility of persons not parties to the record for contempt of court in violation of an injunction under the rule, that when a conspiracy is shown, each conspirator is responsible for the acts of his co-conspirators.¹ It was held by Taft, J., in the Toledo, A. A. & N. W. Railroad case, *supra*, that threatening action to withhold labor from another, for the purpose of inducing, procuring or compelling the other to commit an unlawful act was itself a criminal or unlawful act. As the Interstate Commerce Act, section 3, prohibited the carrier from refusing to interchange traffic with another carrier, the threatening to withhold labor for the purpose of compelling him to refuse such traffic was itself a criminal or unlawful act. The enforcement of a rule of the Brotherhood of Engineers requiring its members to refuse to handle property of a railroad system with which the brotherhood was at issue was held to constitute a criminal conspiracy under the laws of the United States, and the officers and all members of the brotherhood engaged in enforcing the rule were held equally guilty and subject to the penalties of the section.

The courts have allowed proof of the character and purposes of a conspiracy to be made by official proclamation, newspapers and reports, and other matters of public current history.²

It was also held in these cases that the parties to a criminal conspiracy are liable for any actual loss to private parties inflicted in pursuance of their conspiracy. The gist of any such action however is not as in criminal cases in the combination, but in the fact of injury, and no civil liability arises unless injury is done. Ordinarily the only difference between the civil liability for an injury from one person and from the same acts done by a conspiracy is in the greater probability of injury in the latter case. The threat of such injury from which irreparable injury would flow warranted the relief by injunction to prevent the injury.

¹ In re Bessette, 111 Fed. Rep. 417 (1901).

² In re Debs, *supra*; U. S. v. Amalgamated Ass'n, *supra*; Clune v. U. S., *supra*.

It should be observed however that a conspiracy may consist in a combination to accomplish a lawful end by means which are unlawful, though not criminal in the sense that they are made punishable by statute. All criminal acts are unlawful, but unlawful acts are not all criminal. As a concerted peaceful cessation from labor is lawful, there can be no basis of a charge of conspiracy in such cases, unless unlawful means are employed in furtherance of the purposes of the strike. There can be no conspiracy in the exercise of a lawful right by lawful means, and it is immaterial in such a case what may be the motive in this exercise of a lawful right. As men may leave their employment at will, when not under contract, so the employer may exercise his right of terminating the relation, where there is no contract, whatever the motive, and no charge of conspiracy can be based upon such exercise of a lawful right.¹

§ 95 (83). Distinguished from common-law conspiracy.— Conspiracy under the laws of the United States as applied in interstate commerce cases is to be distinguished from common-law conspiracy, which is in force in some of the states. Thus, in England it was found necessary to legalize strikes of workmen by the enactment of the "Conspiracy and Protection of Property Act" of 1875.² The law of the United States requires an act to be done affecting the object of the conspiracy, that is, an overt act, and the conspiracy must relate to an offense against the United States or the defrauding the United

¹ *Boyer v. Western Union Tel. Co.*, 124 Fed. Rep. 246 (E. Dist. of Mo. 1903).

² 38, 39 Vic. c. 86, providing that an agreement or combination by two or more persons to do or to procure to be done any act in contemplation or furtherance of a trade dispute between employers and workmen shall not be indictable as a conspiracy, for such act, if committed by one person, would not be punishable as a crime. Nothing in this section shall exempt from punishment any

person guilty of a conspiracy for which a punishment is awarded by act of parliament.

It was held in *Regina v. Bauld*, 13 Cox C. C., 282 (1876), that under this act neither master nor men had a right to take any proceedings to compel other masters or men to adopt their views on any trade question. With this section were also enacted certain limitations and restrictions upon the "besetting" by picketing and solicitation in case of strikes

States. Not only obstruction of the mails, but any direct and intended interference with interstate commerce, if committed by one person, is an offense against the United States, and punishable as such.¹ The law of conspiracy therefore in such a case is not the basis of the criminal action, as the offense is not made by the combination, but by the illegality of the end proposed, whether the means employed are lawful or unlawful. The enactment of the English statute by congress would have no material bearing upon the law of conspiracy as now applied in interstate commerce cases. As a concerted peaceable cessation from labor is lawful, in interstate employment as in any other, there is in such cases no illegality in the object sought, and no statute is required to legalize such action.

The English statute only applies to criminal prosecutions for conspiracies, and combinations for unlawful, though not criminal ends, as the destruction or injury of another's property or business, without justifiable reason, are still unlawful in England, and still constitute the basis of civil liability.

§ 96 (84). Interstate commerce in relation to employes therein.—There has been some difference of judicial opinion as to the illegality of boycotts when unattended with violence, intimidation or other illegal methods, that is whether in the absence of statute, the act which one might lawfully do, as the withholding of patronage from another, is made illegal by combinations with others to do the same act. Thus it has been said that malice or the specific intent to injure the party may constitute a combination an illegal conspiracy, while other authorities have based the legal right to relief upon the greater probability of injury in the case of a combination, and it has been denied that private malice can be an ingredient in making a civil action,² except in certain recognized exceptions where malice is essential, as in malicious prosecution.

¹ Sec. 10 of Interstate Commerce Act, *infra*.

² See prevailing and dissenting opinions in *Hopkins v. Oxley Stave Co.*, *supra*, and *Vegelhan v. Hunter*, 167 Mass. 92 (1886); Taft, J., on the state bench of Ohio, in *Moore v. Bricklayers' Union*, 23

Weekly Law Bul. 48, and 7 Railway & Corp. Law Journal, 108 (1890); *Allen v. Flood*, 67 L. J. Q. B. Rep. 119; (1898), App. Cases 1; Paper of L. C. Karuthoff on Malice as an Ingredient of Civil Actions, American Bar Association of 1898.

This distinction, however, is academic rather than practical in its relations to interstate commerce. There is an obvious distinction between the relations of *quasi-public* corporations, such as carriers to their employes,—which is emphasized by their connection with interstate commerce, and thus a matter of direct federal concern,—and that of private employers to their employes, which grows out of the peculiar relations of such carriers to the public. The former cannot “lock out” their employes by suspending business for a time because of unsatisfactory labor conditions which prevent them from doing business profitably, and in such matter they have not the rights which may be exercised by private manufacturers. The cars must continue to move and traffic must continue to flow. Any interference with the traffic therefore except that which is the incidental result of the exercise of a lawful right, as the ceasing from employment for the betterment of one’s own conditions, is unlawful.

This principle does not require the existence of through routing arrangements between carriers, but rests on the broad declaration of national policy which requires the interchange of traffic, whether through routing under contractual arrangements exists, or not.

This immunity of interstate commerce from direct interference not justified by the lawful exercise of rights is not limited to railroads or other interstate carriers, but is applicable to any parties engaged in transporting or handling interstate traffic, such as teamsters, draymen, transfer employes, or others, that is wherever the services are essential to the continued moving of interstate traffic from the point of shipment

The weight of American authority is condemnatory of “boycotts,” that is, of organized efforts to destroy another’s business. The cases are usually complicated, however, with distinctly illegal “means.” See *State v. Glidden*, 55 Conn. 46 (1887); *Crump v. Commonwealth*, 84 Va. 927 (1889); *State v. Stewart*, 59 Vt. 273 (1887); *State v. Donaldson*, 32 N. J. Law, 151, where indictments for con-

spiracy in boycott cases were sustained. See also *Casey v. Central Typo. Union*, 45 Fed. Rep. 135 (1891); *Old Dominion S. S. Co. v. McKenna*, 30 Fed. Rep. 49 (1887) (So. Dist. of Ohio); *Carew v. Rutherford*, 106 Mass. 1; *Walker v. Cronin*, 107 Mass. 555; *Doremus v. Hennessy*, 176 Ill. 608; *Lucke v. Clothing Cutters & Trimmers Assembly*, 77 Md. 396.

by the consignor in one state to the delivery to the consignee in another state.¹ Thus combinations in restraint of interstate commerce are obnoxious to the federal law, though the subjects of such contracts are within the jurisdiction of the state.² A boycott involving any form of interference with interstate traffic at any stage would be unlawful.³ Thus, a combination in New Orleans to enforce the employment of none but union men in all departments of labor became a combination in restraint of interstate commerce within the meaning of the statute when, in order to gain its ends, it sought to bring about a discontinuance of labor in all departments of business including the transportation of goods from state to state and from foreign nations.⁴

§ 97 (85). "Picketing" and "soliciting" in interstate commerce.—The same distinction is to be applied and the same distinction recognized in determining the rights of striking employes in picketing the approaches to stations or besetting, by soliciting or otherwise, their fellow-employes who do not strike, or those who are employed to take their places. It is not within the scope of this work to consider what is the extent or what are the limitations of the right to picket or solicit in private employment. Such questions are frequently presented to the state courts, and also in the federal courts in cases where their jurisdiction is invoked on grounds of diverse citizenship, and no distinctly federal question is involved.⁵ The public interest, which is not considered paramount in ordinary trade disputes, that is, the public convenience and even the public necessities, are often not given the weight that they should have. But wherever interstate or foreign commerce is involved, this public interest is made paramount by the laws of the United States. All classes of the community, workingmen as well as capitalists, are interested in the prompt transmission of the mails and the uninterrupted carriage of persons and freight.

¹ See *Rhodes v. Iowa*, 170 U. S. 412, 42 L. Ed. 1088 (1897).

² *Addyston Pipe & Steel Co. v. United States*, *supra*; *United States v. Swift*, 122 Fed. Rep. 529 (N. Dist. of Ill.) (1903).

³ See *Knudson v. Benn* (Dist. of Minn.), 123 Fed. Rep. 636 (1903).

⁴ *United States v. Workingmen's Amalgamated Council of New Orleans* (E. D. of La.), *supra*.

⁵ *Kelley v. Robinson* (C. C. A., 8th Cir.), 187 Fed. 415; *Iron Moulders' Union v. Allis-Chalmers* (C. C. A., 7th Cir.), *supra*.

Any form of interference therefore with the free movement of interstate traffic, whether by picketing or soliciting, or any form of obstruction, would be a direct interference with interstate commerce and unlawful as such, when it is not the incidental result of the exercise of a lawful right, as the concerted cessation from employment. It is true that a concerted cessation from employment, as in strikes, results also in an interference with interstate commerce, and may involve widespread public inconvenience and suffering, but that is the incidental result of the exercise of a lawful right. After this right is exercised, the interference thereafter resulting from boycotting any interstate traffic, or soliciting or besetting employes in such commerce to leave their employment, is not incidental, but is caused by a direct interference with interstate commerce. This distinction is not based upon any favor to the carrier, or for any abridgment of the rights of employes, but because the public interest, which concerns all citizens alike, is paramount.¹

§ 98 (86). **The status of interstate railroad employes is that of free contract.**—The relation of interstate carriers to their employes is that of free contract, terminable by either party, subject to the terms of the contract. This relation therefore is not analogous to that of seamen in the maritime service, who to a certain extent surrender their liberty in their employment and are punishable for an unlawful desertion.² It was said in *Arthur v. Oakes*³ that, in the absence of legisla-

¹ *United States v. Workingmen's Amalgamated Council, supra*; *Knudson v. Benn, supra* (Minn.); *Union Pacific R. Co. v. Ruef* (Dist. of Neb.), 120 Fed. Rep. 102 (1902).

² The supreme court said, *Robertson v. Baldwin* 165 U. S. l. c. 287, 41 L. Ed. 715 (1896), in sustaining the constitutionality of sections 4598 and 4599, R. S. U. S., 3 Comp. Stat. p. 3115, authorizing apprehension of deserting seamen, that "seamen are treated by congress, as well as by the parliament of Great Britain, as deficient in

that full and intelligent responsibility for their acts which is accredited to ordinary adults, and as needing the protection of the law, in the same sense in which minors and wards are entitled to the protection of their parents and guardians." Harlan, J., dissented, saying that the holding of any person in custody for the purpose of compelling him to render personal service in a private business was "involuntary servitude," prohibited by the constitution.

³ 11 C. C. A. 209, and 63 Fed. Rep. 310 (1894).

tion to the contrary, the right of one in the service of a *quasi*-public corporation to withdraw himself at such time as he sees fit, and the right of the managers of the corporation to discharge an employe whenever they see fit, must be deemed so far absolute that no court could compel the continuance of the employment on the demand of either party.

It has been suggested that there are limits upon the right of the employes of a railroad to abandon their employment; that is, that it should not be exercised at a time or under circumstances indicating a purpose to obstruct commerce or to prevent its operation, rather than to exercise the lawful right of withdrawal from employment.¹ Thus the supreme court, in affirming the jurisdiction of the circuit court in punishing an engineer for contempt of an injunction,² said that it was not necessary to decide whether an engineer may suddenly and without notice quit the service of a railroad company at an intermediate station or between stations, though cases may be imagined where the sudden abandonment of a trainload of passengers might imperil their safety or even their lives, as in this case the court below had found from the testimony that the petitioner did not quit in good faith, but intended to continue in the company's service, and that his conduct was a device to avoid obeying the order of the court.

This subject of the exercise of the right to leave employment was discussed by the circuit court of appeals for the seventh circuit in an opinion by Justice Harlan³ in a case wherein the

¹ While there is no federal statute on the subject, there are special statutory provisions in the several states, Maine, Pennsylvania, Illinois, New Jersey, Kansas, Delaware and Mississippi, the purpose of which is to prevent such sudden abandonment of employment as should endanger life or seriously obstruct the actual physical use of the railroad. In several of the states the provision is made that no locomotive engineer, and in some states conductors and trainmen, shall abandon the locomotive and

train at any other place than the regular scheduled end of the road. Illinois Revised Statutes, § Starr & Curtis, p. 3297; Maine R. S. 1903, p. 927, sec. 7; Pennsylvania R. S. Purdon's Dig. 920; New Jersey R. S. 1895, p. 2696, sec. 245; Kansas R. S. 1909, sec. 2384; Delaware R. S., p. 928; Mississippi R. S. 1906, sec. 1345. See also Report of Industrial Commission, vol. 5, p. 132; vol. 17, p. 601.

² In re Lennon, 166 U. S. 548 (1897), 41 L. Ed. 1110.

³ Arthur v. Oakes, *supra*.

court below had made an order enjoining employes from so quitting the service of the receivers, "with or without notice, as to cripple the property or prevent the operation of the railroad." The court said that the latter words, "as to cripple the property," etc., should be stricken out. The fact that employes of railroads may quit under circumstances which would show bad faith or reckless disregard of their contracts, or the convenience or interests of both the employer and the public, did not justify a departure from the general rule that equity would not require employes against their will to remain in the personal service of the employer. The court ruled however that the injunction properly prohibited the employes from combining and conspiring to quit with or without notice the service of the receivers "with the object and intent of crippling the property in their custody or embarrassing the operation of the railroad."

This case was not based upon either the Interstate Commerce Act or the Anti-Trust Act, but, as the court said, upon the general principles which controlled the exercise of jurisdiction by courts of equity.

§ 99 (87). The right of labor organization includes the right of representation.—The right of organization into unions or brotherhoods by the employes of interstate railroads is recognised both by the federal statutes¹ and by the courts, and this right carries with it the recognition of the right of "collective bargaining" by employes through their organizations in the betterment of their own conditions of service. Incidental to this right thus recognized is the right of representation of employes by their own officials selected by them in the presentation of their demands for the betterment of their conditions of service. A distinction is properly made between such representatives of employes who seek the redress of the grievances of those represented by them, and the status of those not connected with employes who seek to induce them to break their contracts of employment for other purposes than their own betterment.² This right of representation was

¹ See National statute of arbitration, *supra*. Co., *supra*; see also charge of Judge Grosscup to grand jury.

² Thomas v. C., N. O. & T. P. R. *supra*.

directly involved in a case decided by Judge Adams in the eastern district of Missouri.¹ In this case an injunction was sought by the railroad company against the officials of the railroad brotherhoods of trainmen and firemen enjoining them from calling a strike on an interstate railroad on the ground, among others, that these officials were not employes of the railroad, and that their action in calling a strike would be a direct interference with interstate commerce. The court found from the evidence that there was an existing dispute about the conditions of employment and that the officers of the brotherhood had been directed by the employes on the road to call a strike and therefore held that the employes had a right to act by their representatives, and the injunction was dissolved.

§ 100 (88). Injunctions in interstate commerce.—In a progressive industrial civilization preventive remedies are frequently the only adequate remedies when business or property rights are invaded, particularly when there is any question as to the pecuniary responsibility of the parties charged with the wrong. This is the case with labor disturbances which involve a direct interruption of business and damages, which are in the nature of things irreparable, because they cannot be accurately ascertained, even if the defendants were responsible. Where the public interest intervenes, as in the case of interstate commerce, where the traffic must continue to be moved and the cars continue to run, some form of preventive relief, usually that of injunction, is ordinarily the only available remedy.

The influence upon our jurisprudence of the ancient historic jealousy of courts of chancery² is illustrated in the conten-

¹ *Wabash R. R. Co. v. Hannah et al.*, *supra*.

² The use of preventive remedies seems more firmly established in the English courts than in our own. The distinction between the powers of courts of law and courts of equity has there now only historical interest. All divisions of the supreme court of

grant injunctions when it shall appear to the court to be just or convenient that such shall be made (subsec. 8, sec. 25 Judicature Act, 1873), and to award damages in addition to or in substitution for such injunction.

On the general subject of the modern use of injunctions, see F. J. Stimson in *Political Science Quarterly*, June, 1895; Charles

tion that where the trespasses or other wrongs to business or other property involve a violation of criminal law, there is no jurisdiction in equity to enjoin the commission of the acts. This contention is obviously unsound. The injunction restrains not the crime, but the irreparable injury to property. The question was definitely settled by the supreme court in the Debs case,¹ where the court held that while a chancellor had no criminal jurisdiction, and something more than the threatened commission of an offense against the laws of the land was necessary to call into exercise the injunctive power of the court, that when interference with property, actual or threatened, appeared, the jurisdiction of the court of equity arises, and is not destroyed by the fact that the interferences are accompanied by or are themselves a violation of the criminal law. The jurisdiction of the civil court is invoked, not to enforce the criminal law and to punish the wrong-doer, but to compensate the injured party for the damages which he has suffered, or to protect him from irreparable injury, and it is no defense to the civil action that the same act by defendant exposes him also to indictment and punishment in a court of criminal jurisdiction. In this case the injunction was sought by the government itself, and it is obvious that the right of any other litigant to preventive relief in the case of threatened irreparable injury to property by criminal trespass would be also available.

The same remedy of injunction was invoked by the government against the railroads of the country in the proceedings under the Anti-Trust Act,² and also against combinations of capitalists under the same statute.³ In the Beef Trust case,⁴ the supreme court affirmed the decree of the circuit of Illinois enjoining the defendants in a suit by the United States against certain specific acts in restraint of competition in interstate commerce.

In this latter case however the court directed a modifica-

Claffin Allen at American Bar Association, 1894; Hon. Wm. H. Taft, then circuit judge, in defense of the federal judiciary, American Bar Association, 1895.

¹ 158 U. S. 1. c. p. 593, 39 L. Ed. 1106, *supra*.

² See United States v. Trans-

Missouri Freight Association; United States v. Joint Traffic Association, and United States v. Northern Securities Co., *supra*; Swift v. United States, 196 U. S. 375, 49 L. Ed. 518 (1905).

³ See Anti-Trust Law, *infra*.

⁴ Swift v. United States, *infra*.

tion of the injunction by striking out the general words "or by any other method or device, the purpose and effect of which is to restrain commerce as aforesaid," saying that the defendants ought to be informed as accurately as the case permitted what they were forbidden to do. The court said that while it was bound to enforce the act, it was also bound by the first principles of justice not to sanction a decree so vague as to put the whole conduct of defendant's business at the peril of a summons for contempt, and that it could not issue a general injunction against all possible breaches of the law.

There has been considerable discussion in the courts and also in the committees of congress as to the scope of injunctions rendered in trade disputes. Thus, in the Debs case the injunction order included all persons whatsoever, not named therein, from and after the time when they shall severally have notice of such order. The question as to the scope of the order was not definitely determined, as the order was issued and served upon the defendant, so that this feature of the order was not discussed in the supreme court, although the power of the court under such an order was sustained in the circuit court.¹

Persons who are in privity with the defendant as agents, servants or employes are to be distinguished from independent tort-feasors who are not shown to be in any wise allied with the defendants.² The supreme court sustained the jurisdiction of the circuit court in the case of *In re Lennon*,³ saying that it was sufficient that he had actual notice, although he was not a party to the suit, nor served with process; in that case however Lennon was an employe of the defendant, which had been enjoined from refusing to interchange traffic with the complainant, and he was shown, with full knowledge of the injunction, to have refused to obey it.

Other questions have been raised as to the proper scope of injunctions in trade disputes, particularly with reference to

¹ *Toledo, etc. R. Co. v. Penn. R. Co.*, *supra*; *In re Debs*, *supra*. As to the jurisdiction of the courts in issuing injunctions under the Interstate Commerce Act, see secs. 8 and 9 of Act, *infra*; and as to the Anti-Trust Act and the pro-

cedure thereunder, see Anti-Trust Act, *infra*, section 4.

² *In re Reese*, 98 Fed. Rep. 984, 47 C. C. A. 87, and 107 Fed. Rep. 942 (1900).

³ *Supra*.

the conduct of striking employes, but these have been in cases, where the jurisdiction of the federal courts was based on diverse citizenship as in mining, manufacturing and other local industries where interstate commerce was in no wise involved.¹

§ 101 (89). Contempt in United States courts.—A contempt proceeding, said the supreme court in a recent case,² is criminal in its nature in that the party is charged with doing something forbidden, and if found guilty, is punished. Yet it may be resorted to in civil as well as in criminal actions, and also independently of civil or criminal action. While the power to punish for contempts is inherent in all courts, the exercise of the power by the courts of the United States has been regulated by statute, as follows:³

“Courts of the United States shall have power to impose and administer all necessary oaths and to punish by fine or imprisonment at the discretion of the courts contempt of their authority; provided that such power to punish for contempt shall not be construed to extend to any case except the misbehavior of any person in their presence, or so near thereto as to obstruct the officers of said court in their official transactions, and the disobedience or resistance by such officer or by any party, juror, witness or other person to any lawful order, process, rule, decree, or command of said court.”

Whether a particular act constitutes a contempt, as well as the mode of proceeding against the offender, are left to be determined according to such established rules of the common law as are applicable to the situation. A federal court may punish for contempt in its presence, or so near as to obstruct justice though the offense is indictable.⁴

¹ See § 91, *supra*; see also discussion before the Judiciary Committee of the House of Representatives of the 58th congress. The agitation over the increased use of injunctions in trade disputes and the application of the law of conspiracy in the trial of contempts has been extensively discussed in congress in connection with the so-called Anti-Conspiracy and Anti-Injunction bill, to limit the meaning of the word “con-

spiracy” and the use of restraining orders and injunctions in trade disputes, which has been introduced in several successive congresses, but has not been enacted into law.

² *Bessette v. Conkey Co.*, 194 U. S. 324, 48 L. Ed. 997 (1904).

³ Sec. 725, R. S. U. S., 1 Comp. Stats. p. 583.

⁴ *In re Savin*, 131 U. S. 267, 33 L. Ed. 150 (1889).

The interference with the operation of a road by a receiver appointed by the federal court is itself a contempt, as the receiver is an officer of the court, and no specific injunction order in such case is required.¹ The power of the court to punish disobedience of an injunction order by a party to the case as a contempt has been repeatedly adjudged.² The power to punish for contempt is inherent in all courts of record, and it has been held that in the case of courts established by the constitution this power cannot be abridged by the legislature, as this is the inherent power of a co-ordinate branch of the government.³

It was intimated by the supreme court however⁴ that the power of the circuit courts and district courts of the United States to punish for contempt could be regulated by congress, and that their power is limited by the act of 1831, cited above, and that the power to punish by fine and imprisonment is negative of all other forms of punishment. The circuit court said in the Debs case⁵ that the power of the court to make an order carries with it the equal power to punish for disobedience of that order and the inquiry as to the question of disobedience has been from time immemorial within the discretion of the court. It was also held that a case of contempt was not triable by jury, nor is a judgment on such charge a substitute for, or any defense to a criminal prosecution for the same act.

§ 102. Direct and indirect contempts.—The increasing use of injunctions in the federal courts in trade disputes, has led to a discussion on the inherent distinction between direct and indirect contempts, that is, between those committed in the presence of the court and properly subject as such to summary hearing and punishment and requiring no hearing, as the acts are committed in the view of the court, and on the other hand those of alleged disobedience to the orders of the court not committed in its presence, and therefore necessarily re-

¹ United States v. Kane, 23 Fed. Rep. 748; In re Doolittle, 23 Fed. Rep. 544; In re Higgins, 27 Fed. Rep. 443; Thomas v. R. Co., *supra*.

² Ex Parte Lennon, *supra*; In re Debs, *supra*.

³ Carter v. Commonwealth, 96 Va. 791 (1899).

⁴ Ex parte Robinson, 19 Wall. 513, 22 L. Ed. 205 (1874).

⁵ 158 U. S., l. c. 594.

quiring proof before punishment can be imposed. It has been urged as to this latter class of cases, particularly where parties are charged with the responsibility of the acts of others under the law of conspiracy, that the hearing should not be summary, but that process should be served, and that the procedure should be regulated by law in accordance with constitutional guarantees in criminal hearings.¹

§ 103. Criminal and civil contempts.—Contempts are also classified as criminal contempts, which are prosecuted to preserve the power and vindicate the dignity of the court in punishing the defendant, and as civil contempts, which are prosecuted to preserve and enforce the rights of private parties and to compel obedience to orders and decrees so as to enforce the rights and administer the remedies to which the court has found such parties to be entitled.

A criminal contempt, said the court of appeals in the *Nevitt* case,² involves no element of personal injury. It is directed

¹ In the 54th congress, 1896, a bill was reported from the judiciary committee, providing that contempts be divided into two classes, direct and indirect, the former including contempts committed during the sitting of a court, or of a judge in chambers, or so near thereto as to obstruct the administration of justice. These were to be punishable summarily, without written accusation; while the other, that is, indirect contempts, were to require an order to show cause and a procedure upon testimony, as in criminal cases, and a jury trial, if applied for by the accused, with a preservation of the testimony by bill of exceptions and stay of the judgment upon giving bond pending appeal.

The provisions of the act applied to all proceedings for contempt in all courts except the supreme court. The bill passed the

senate and was reported with amendments by the house judiciary committee (see House Report No. 2471, 54th congress), but it was not reached for passage. It has been introduced in substantially the same form in different congresses since, but has not been enacted into law.

² In *re Nevitt*, Cir. Ct. App., 8th Circuit, 55 C. C. A. 622, 117 Fed Rep. 448 (1902), quoted by the supreme court in *Bessette v. W. R. Conkey Co.*, *supra*.

In *Clay v. Waters*, 178 Fed. 385 (1910), C. C. A. 8th circuit, it was held that a judgment for a criminal contempt committed in the course of a suit in equity, is reversible by writ of error only, and that a judgment against a party to a suit in equity for a civil contempt committed therein before final decree, is reversible by appeal from the final decree only, and that judgment against

against the power and dignity of the court and private parties have little, if any, interest in the proceedings for its punishment.

It was said by the supreme court in the *Bessette* case,¹ which was a trade dispute not involving interstate commerce, that it may not be always easy to classify the particular act as belonging to either of these two classes and that it may partake of the characteristics of both. In combinations interfering with interstate commerce whether the proceedings are filed directly by government or by public carriers, it would seem that the violation of the injunction order made for the promotion of public and not private ends would fall in the class of criminal rather than civil contempts.

The fact that a part of the fine imposed in punishment of a contempt is made payable to the government is not conclusive that it is a criminal and not a civil contempt.² The distinguishing characteristic between the civil and criminal contempt is the dominating object of the prosecution and the party chiefly interested therein. In the language of the circuit court of appeals,³ if the chief purpose of the proceed-

a party for a civil contempt committed after the decree is reversible by appeal.

¹ 1 L. c. p. 329.

² In *re Christensen Engineering Co.*, 194 U. S. 459, 48 L. Ed. 1072 (1904), the court held that an order of the circuit court adjudging the defendant in a patent suit guilty of a contempt in disobeying a preliminary injunction, and ordering him to pay a fine, one-half to the complainant and one-half to the United States was clearly a criminal contempt, and as such reviewable on writ of error by the circuit court of appeals without waiting for final decree and mandamus was issued directing that court to reinstate and hear the case. In *Merchant's Stock & Grain Co. v. Board of Trade*, 187 Fed. 893 (1911), the

circuit court of appeals, 8th circuit, distinguished from the *Christensen* case a judgment against a party for violation of a temporary injunction, although one-fourth of the fine imposed was paid to the United States, and the balance to the complainant, and held that the violation of the order was a civil contempt, as the chief and dominating purpose was the protection of the party complainant, and that while a judgment for a criminal contempt was reviewable by writ of error, a judgment for a civil contempt committed before final decree was reviewable by appeal from the final decree only, and if it was committed after the final decree it was reviewable by appeal.

³ *Merchant's Stock & Grain Co. Case*, *supra*.

ing for contempt is to enforce the rights and administer the remedies to which courts have adjudged or may adjudge a private party to be entitled, and if such private party is the person chiefly interested in it, the proceeding is for a civil contempt. If the chief object of the prosecution as in cases of misconduct in court, or the disobedience of a subpoena, will be punishment of the offender to preserve the right and vindicate the dignity of the court, and if the party chiefly interested in the prosecution is the government or the public, the proceeding is for a criminal contempt.

The distinction between civil and criminal contempts was forcibly illustrated in the contempt proceedings growing out of the litigation between the Buck Stove & Range Co. and the American Federation of Labor.¹ Individual officials of the federation were charged with contempt of the injunction in publishing references to the complainants under the headings "unfair" or "we don't patronize" and were found guilty of contempt and sentenced to imprisonment. Subsequently the litigation between the parties to the suit was adjusted and the case was dismissed. The supreme court held that a contempt proceeding was as a rule neither wholly civil nor wholly criminal, but this proceeding under the facts of this case was distinctively civil, and that there was nothing in the record indicating that it was a proceeding with the court or the government on one side and the defendant on the other. As it was a civil proceeding, imprisonment could only be imposed as a coercive means to compel the doing of some act commanded by the court for the benefit of the other party. The

¹ Gompers v. Buck Stove & Range Co., 220 U. S. —, 55 L. Ed. —, May 15, 1911, reversing 33 App. D. C. 516. The court in this case said proceedings at law for criminal contempt should be entitled as a separate action. That this was not a mere matter of form as the citizen was entitled to know by a mere inspection of the proceedings whether it was instituted for private litigation or for public prosecution. He should not be

left in doubt as to whether relief or punishment was the object in view. In a criminal contempt the defendant is entitled to the constitutional protection against self incrimination but not in a proceeding for civil contempt. In a civil case the complainant is entitled to the costs, but in a criminal contempt the costs collected go to the government for the use of its officials.

proceeding therefore necessarily ended with the settlement of the main case of which it was a part; and it was therefore dismissed without prejudice to the right of the court to punish by a proper proceeding any contempt which had been committed against its own authority.

§ 104. Conspiracy and contempt.—The law of conspiracy has been applied in proceedings for contempt, and persons not parties to the record have been charged with contempt as co-conspirators with the defendants, and therefore in law responsible for their acts.¹ The liability to punishment for contempt is not limited to parties to the record, but any person, who knowingly assists in defeating the order of a court, may be charged with contempt therefor. In such cases, however, where the injunction has been issued for the benefit of a private person with no public interest involved, the offense of the person not a party is solely that of resistance to the authority and dignity of the court and he should be proceeded against upon that theory, and not upon the theory of being bound by the injunction as a party thereto.²

An order of a federal circuit court, adjudging a person not a party to a suit guilty of contempt for conspiring to violate an injunction in a trade dispute, was held reviewable by writ of error in the circuit court of appeals, but in such a writ only matters of law can be considered, the decision of the trial tribunal being conclusive of the facts.³

§ 105 (90). Mandatory injunctions in interstate commerce.—As a preventive remedy is the only adequate remedy in the case of a threatening of interference with interstate commerce, the form of the preventive relief must be adapted to the emergency, and the injunction mandatory in its terms is therefore often the only remedy which meets the emergency. A mandatory injunction is one that compels the defendant to restore things to their former condition, and virtually directs him to perform the act. Specific provision is made in the Interstate Commerce Act for a

¹ See *In re Bessette*, 111 Fed. Rep. 417.

² *Bessette v. Conkey Co.*, *supra* (1904).

³ See *In re Reese*, 98 Fed. Rep. 984, *supra*.

mandamus to compel the performance of the duties of a carrier. Section 23 of the Interstate Commerce Act, *infra*.

Such an injunction may be issued as well upon a proper showing on a preliminary as on a final hearing. It was said by Taft, J.,¹ that the office of a preliminary injunction is to preserve the status quo until upon final hearing the court may grant full relief, and generally this can be accomplished by an injunction prohibitory in form. It may sometimes happen, however, that the status quo is not a condition of rest, but of action, and the condition of rest is exactly what will inflict an irreparable injury upon the complainant. In such cases therefore it is only a mandatory injunction, compelling the traffic to flow as it is wont to flow, which will protect the complainant from injury.

It was said by the supreme court² that it is one of the most useful functions of a court of equity that its methods of procedure are capable of being made such as to accomodate themselves to the development of the interests of the public in the progress of trade and traffic by new methods of intercourse and transportation, and it may be added, in securing the uninterrupted movement of commerce.³

¹ Toledo, A. A., etc., R. Co. Case, *supra*.

² Joy v. St. Louis, 138 U. S. 1, 1. c. p. 50, 34 L. Ed. 859 (1891).

³ In So. Cal. Co. v. Rutherford, *supra*, the court granted an injunction to a railroad company against its employes, compelling

them to perform all their regular and accustomed duties as long as they remain in the employment of the complainant company. This was in a case where the employes, while continuing in the service, had boycotted the Pullman Car Co.

CHAPTER VII.

FEDERAL CONTROL OF STATE RAILROAD REGULATION.

- § 106. State regulation of railroads through state commissions.**
- 107. Assessment of expense of state regulation upon railroads.**
- 108. State regulation not dependent upon state incorporation.**
- 109. State cannot regulate any part of interstate rates.**
- 110. Competitive effect of intrastate rates upon interstate rates.**
- 111. The fourteenth amendment.**
- 112. Federal review of state regulation of railroads.**
- 113. The federal jurisdiction must be invoked on substantial grounds.**
- 114. Jurisdiction of the federal courts not limited by state legislation.**
- 115. Injunctions against state officials not violative of the eleventh amendment.**
- 116. The regulating orders of state commissions legislative, not judicial.**
- 117. Procedure in federal review of state legislation.**
- 118. Temporary injunctions in federal control of state legislation.**
- 119. Temporary injunction under act of 1910.**
- 120. Reasonableness and confiscation in regulation of rates.**
- 121. State rates determined without reference to interstate traffic.**
- 122. The supreme court on state regulation.**
- 123. Schedules of rates and special rates.**
- 124. The valuation of railroad property in state regulation.**
- 125. The apportionment of railroad property in state regulation.**
- 126. Confiscation in state regulation; how proved.**
- 127. Rate of profit necessary to avoid charge of confiscation.**
- 128. Protection of the carrier against discriminating state regulation.**
- 129. The state power of regulation not limited to rates.**
- 130. The state anti-trust laws and the fourteenth amendment.**
- 131. Classification in state railroad legislation.**

§ 106 (91). State regulation of railroads through state commissions.—The complexity of our dual form of government is nowhere more forcibly illustrated than in the administration of the railway systems of the country under the state commissions as to their state traffic, and under the Interstate Commerce Commission as to their interstate traffic. The power of the states to regulate the rates of railroads and other quasi public business had been definitely established in the Granger cases, as already seen, prior to the adoption of the Interstate Commerce Act. This power of the states could be exercised either directly by the legislature fixing the rates, or could be delegated to a commission act-

ing for the state. Commissions had been established in many of the states prior to 1887, some with advisory powers and others with powers to fix maximum rates.¹

A railroad forming a continuous line in two or more states, and owned and managed by a corporation, whose corporate powers are derived from the legislatures of each state in which the road is situated,² is as to the domestic traffic of each state a corporation of that state, subject to the laws of the state not in conflict with the constitution of the United States, and an authorization of a commission by a state to fix a schedule of rates for a railroad is not an unconstitutional delegation of legislative power.³ Justice Brewer said in the case first cited that the line of demarcation between legislative and administrative functions was not easily discernable and that the reasonableness of a rate was constantly changing with changing circumstances, and therefore was peculiarly a subject for an administrative board to determine.

§ 107. Assessment of expense of state regulation upon railroads.—The entire expenses of a state railroad commission, including the expenses and salaries of the railroad commissioners, may be lawfully assessed upon railroads operating within a state according to their gross income proportionate to the number of miles of their roads in the state.⁴ This tax was claimed to

¹ See review of state commission statutes in *Maximum Rate Case*, 167 U. S. 495 (1897), 42 L. Ed. 251.

² *Railroad Commission Cases*, 116 U. S. 307 (1886), 29 L. Ed. 636.

³ *Chicago & N. W. R. Co. v. Dey*, 35 Fed. 866 (1888); also *Railroad Commission Cases*, *supra*; *Regan v. Farmers Loan & Trust Co.*, *supra*. In the *Maximum Rate Case*, 167 U. S. *supra*, the court, in considering the question whether in the original Interstate Commerce Act, before the amendment of 1906, power was delegated to the Interstate Commerce Commission to fix rates, concluded that

congress did not attempt to exercise the power, but assumed the existence of the power, saying, "There were three obvious and dissimilar courses open for consideration. Congress might itself prescribe the rates; or it might commit to some subordinate tribunal this duty, or it might leave with the companies the right to fix rates, subject to regulations and restrictions as well as to that rule, which is as old as the existence of common carriers, to-wit: that rates must be reasonable."

⁴ See *Charlotte C. & A. R. R. Co. v. Gibbs*, 142 U. S. 386, 35 L. Ed. page 1051 (1892).

be an unlawful discrimination imposing a new burden and therefore a denial of equal protection of the laws, as it was beyond that levied upon other corporations, and was in addition to the general property tax levied upon the property of the railroads in like manner as upon similar property of individuals in proportion to value. The court said that the services of the commission were for the benefit of the railroad corporations as well as of the public. It was therefore reasonable that the expenses should be so apportioned, and in this there was no violation of the state constitution providing for uniformity in taxation or of the guarantees of the federal constitution for due process of law and the equal protection of the law.

§ 108 (92). *State regulation not dependent upon state incorporation.*—This power of regulation under state commissions, as that of the Interstate Commerce Commission under the Interstate Commerce Act, is dependent upon the character of the traffic, whether intrastate or interstate, and not upon the state or federal incorporation of the carrier. The same railroad is subject as to these two classes of traffic to the state and federal authority respectively. Thus the power of the Interstate Commerce Commission extends to railroads organized under state and federal authority as well as to corporations organized under the laws of Canada and operating in the United States. In the *Northern Securities* case a corporation organized under state authority, for the purpose of holding the stock of competing interstate railroads, was adjudged an unlawful combination under the Anti-Trust Act of Congress.¹

On the other hand, a railroad incorporated by act of congress is subject to the control of the state in all matters of taxation rates on domestic traffic and to all reasonable police regulations in the absence of anything in the act indicating an intention on the part of congress to remove the corporation from such state control. The silence of congress in this respect, said the supreme court in the *Texas rate* case, is satisfactory assurance that so far as the corporation should transact business wholly within the state congress intended that it should be subjected to the ordinary control exercised by the state over such business.²

¹ *Supra*, § 85.

Company, *supra*; *Smythe v. Ames*,

² *Reagan v. Mercantile Trust* 169 U. S. 466, 42 L. Ed. 819 (1898).

The subjection of the corporation to the law of the state therefore is not based on the acceptance by the railroad company of state regulation, but results from the failure of congress to express any intention in the act of incorporation that it should be exempt from state control.

This state power of regulation of domestic traffic must be distinguished from the concurrent power exercised by the state in the absence of legislation by congress in that class of cases (see *supra*, Chapter II) where the authority of the state is limited not by the existence, but by the exercise of the power of congress. In the class of cases now under consideration the power of the state is independent of congressional action.

§ 109 (93). **State cannot regulate any part of interstate rates.**—It was held in the leading case of the Wabash Railway Company¹ that a state commission had no regulating power over a through interstate rate, that is, over even that part of it which was within the state. The limitations of the state authority were further illustrated in the two Kentucky cases decided in 1901. In the first of these,² the court affirmed the Kentucky court in sustaining a conviction of the railroad company for violation of the long and short haul clause of the Kentucky statute in a rate on an intrastate shipment. The court below had excluded evidence that the rates were reasonable per se, and held that it was immaterial that the less charge for the longer haul was induced by competition, on the ground that the state had authorized the state commission to give relief on application. In the other case at the same term,³ the supreme court held the Kentucky statute

As the court based its opinion upon the construction of the congressional act of incorporation, the question of the power of congress to limit and control, the police power of the state over the property of federally incorporated interstate carriers, located within the state, was not discussed. The Reagan opinion cited the Pacific Railroad tax case, *Railroad Co. v. Pemiston*, 18 Wallace, 5 (1873), 21 L. Ed. 787, wherein it was held that the taxing power of the

state as one of its attributes of sovereignty extended to the property (though not to the federal franchises) of the Union Pac. Railroad incorporated under act of congress.

¹ *Supra*, § 37.

² *L. & N. R. Co. v. Kentucky*, 183 U. S. (1902), 46 L. Ed. 298, reversing 103 Fed. Rep. 216.

³ *L. & N. R. Co. v. Eubank*, 184 U. S. 27 (1902), 46 L. Ed. 416, (Justices Brewer and Gray dissenting).

unconstitutional as construed by the state court in its application to a long and short haul, where the short haul was wholly within the state and the long haul was partly within and partly without the state. The court said that the direct effect of the statute so construed was to regulate the interstate rate, for it was impossible for the carrier to do any interstate business at the local rate, and so it must give up its interstate business, or else reduce the local rate in proportion. The result therefore was a direct interference with commerce between the states, carried on though it may be by a single company.

The fact which vitiated the provision, the court said, was that it compelled the carrier to regulate, adjust or fix his interstate rates within the state, thus enabling the state to directly affect, and in that way to regulate to some extent, the interstate commerce of the carrier, which power of regulation the constitution of the United States gives to the federal congress.

§ 110. Competitive effect of intrastate rates upon interstate rates.—It is the effect and not the terms or declared purpose of state regulation of intrastate rates, that determines whether or not such state imposed rates so substantially burden interstate commerce as to violate the commerce clause of the constitution. While the reduction of state rates of carriers, doing both an interstate and an intrastate business with the same tracks and equipment does not as a matter of law interfere with interstate rates,¹ it has been held in the circuit court in Minnesota that it may so interfere as a matter of fact under certain conditions of state and interstate business. In the Minnesota rate case ² the reduction of

¹ Brewer, J., said, in the Nebraska rate case, in circuit court, 64 Fed. Rep. 172 (1894): "The statute of the state does not work a change in interstate rates any more than an act of congress, prescribing interstate rates, would work a change in local rates. Railroads cannot plead their own convenience, or the effect of competition between themselves and other companies in restraint of the otherwise undeniable power of the state." See also to the same

effect McPherson, J., in Missouri rate case, 168 Fed. Rep. 1 c. 343 (1909), pending on appeal in supreme court (1911). Woodside v. Tonopah R. R. Co., 184 Fed. Rep. 358 (1911) Nevada.

² Sanborn, J. in Shepard v. Northern Pacific R. Co., 184 Fed. Rep. 765 (1911). The question of the effect of intrastate rate reduction upon interstate rates through necessary effect of competitive influence, has not been directly passed upon by the su-

the state imposed local rates was found to compel a reduction of interstate rates to cities in adjoining states, located on the state boundaries, and thus was held directly to burden interstate traffic. The state rates were therefore condemned, irrespective of the further finding that they were confiscatory and violative of the fourteenth amendment.

On the other hand a different view was taken in the circuit court of Kentucky¹ where there were similar conditions of contiguous cities in bordering states, and the court held that the fact that a railroad company in making out its schedule of rates filed with the Interstate Commerce Commission had taken the sum of its local rates in each state did not remove such local rates from the jurisdiction of the state for the purpose of regulation, and that the fact that a reduction of local rates by the state may incidentally place the company under the business necessity of reducing its interstate rates affect the legality of such reduction; the court said that the logic of the company's contention would release its local rates from governmental regulation; as the United States could not fix the local rates, because

preme court; but it was said in earlier proceeding in the Minnesota case, *ex parte Young*, 209 U. S. l. c. 145, that "the question was not at any rate frivolous."

See also *Eubank case supra*.

In the Arkansas rate cases, 187 Fed. Rep. p. 290 (May, 1911), the court, Trieber, J., held that in that case the facts which controlled the decision in the Minnesota case did not exist, and, therefore, it was ruled that the incidental effect of the state rates upon interstate rates was not sufficient to warrant a finding against the rates on that ground.

In *Oregon R. & Nav. Co. v. Campbell*, D. of Oregon, 173 Fed. Rep. 957 (1909), in sustaining a demurrer to a bill enjoining the state board of railroad commissioners for putting in operation

the state schedule of rates and denying the temporary injunction, the court said that the fact that such an order fixing rates and limited by its terms to intrastate shipments incidentally induce a change in interstate rates did not render it nor the statute unconstitutional as a regulation of interstate commerce. Same court in *So. Pac. Co., et al, v. Campbell*, 189 Fed. 696 (1911).

¹ *L. & N. R. R. Co. v. Siler*, 186 Fed. 176 (1911), C. C. E. D. of Ky., *per curiam*. Opinion of three judges sitting (under act of June 18, 1910) (*infra*, § 119) on an application for temporary injunction. This case and the Minnesota and the Arkansas cases *supra*, have been appealed to and are now (Oct. 1911), pending in the supreme court.

they are local and the state could not, because it would thereby cast a burden on interstate commerce.

It is difficult to see how any reasonable, i. e. non-confiscatory regulation of intrastate rates can be held, on account of business or competitive reasons, whatever the practical embarrassment to the railroad, a direct burden upon interstate commerce, and therefore unlawful, consistently with the limitation of the federal constitutional power of regulation, the express declarations of the supreme court in repeated cases, or with the express reservation of section 1 of the Interstate Commerce Act, that the provisions of the act shall not apply to the transportation of persons or property wholly within a state.

§ 111 (94). The fourteenth amendment.—Prior to the adoption of the fourteenth amendment in 1868 there was no appeal to the federal courts against any violation by state power of due process of law or of the equal protection of the laws, which did not involve an interference with national authority or a violation of some provision of the federal constitution. The federal courts administered the state laws and followed, as they still do, the decision given by the state courts as to the construction of the state statutes.

The fourteenth amendment provided in its first clause, that no state should deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. Corporations are persons under this amendment and are therefore entitled to due process of law and to the equal protection of the laws,¹ and a state has no more power to deny due process of law or the equal protection of the laws to a corporation than it has to individual citizens.²

This far-reaching change in our judicial system, whereunder the fundamental rights of property are protected by the federal power against state invasion, was adopted shortly before the judicial declaration of the freedom of interstate commerce against state interference opened the way for the direct exercise of the federal regulating power.

¹ *Santa Clara County v. Southern Pacific R. Co.*, 118 U. S. 394 (1886), 30 L. Ed. 118.

² *Railroad Co. v. Ellis*, 165 U. S. 154 (1897), 41 L. Ed. 667.

§ 112 (95). Federal review of state regulation of railroads.—

The comprehensive power of the state in the regulation of the intrastate traffic of carriers, whether exercised directly under legislative act of the state or through a commission of the state, is subject to the jurisdiction of the courts of the United States under the provisions of the fourteenth amendment guaranteeing due process of law and the equal protection of the laws to all persons against any invasion by state authority.¹

The jurisdiction of the courts of the United States in such cases does not depend upon the unconstitutionality of the state statute, as a valid law may be wrongfully administered by the officers of the state. If the statute of the state, as construed by the highest court of the state having jurisdiction—and this construction by the state courts is conclusive—denies due process of law or equal protection of the laws, the federal jurisdiction under the fourteenth amendment may be invoked.²

While the construction by the state court of its own constitution or statute is accepted as conclusive by the federal court as a local question, in the absence of any such construction by the state court the federal court must construe the state law for itself. Thus where the validity of an order of the state commission was assailed not only on distinctly federal grounds under the fourteenth amendment, but also under the further ground that the commission was not authorized under the state statute to make the order complained of, the supreme court held that the circuit court obtained jurisdiction over the case by virtue of the federal questions; and as the court usually decided a case without reference to questions arising under the federal constitution, where it could be so decided, and in the absence of a definite construction of the statute by the state court, the supreme court concluded that the statute did not grant the com-

¹ Chicago, Milwaukee & St. Paul R. Co. v. Becker, 35 Fed. 883 (1888); Reagan v. Farmers Loan & Trust Co., *supra*; So. Ry. Co. v. Greensboro Ice & Coal Co., 134 Fed. Rep. 82 (1904).

² Reagan v. Farmers Loan & Trust Co., *supra*; Symthe v. Ames, *supra*; Barrow S. S. Co. v. Kane, 170 U. S. 111, 42 L. Ed.

964 (1898). As to the powers conferred upon the commission by the state, the supreme court will follow the ruling of the state court; if the question has not been passed upon by the state court, the supreme court will decide it for itself. Siler v. L. & N. R. R., 213 U. S. 175, 53 L. Ed. 753 (1909).

mission the power to make a general schedule of rates and affirmed the decree against the enforcement of the commission's order on that ground.¹

A state statute providing for the establishment of railroad rates, without giving the corporation an opportunity to be heard, which fixes penalties for disobedience of its provisions by fine so enormous and imprisonment so severe as to intimidate the corporations and their officers from resorting to the courts to test the validity of the rates, is unconstitutional as depriving the corporation of the equal protection of the laws.²

§ 113. The federal jurisdiction must be invoked on substantial grounds.—The circuit court of the United States³ has jurisdiction irrespective of diverse citizenship in a case when the constitution of law of a state is claimed to violate the constitution of the United States, but the claim must be real and substantial. The state may act through different agencies, through its legislative, executive or judicial authority, and a municipal corporation may be such an agency, when it acts as a political subdivision of the state. A municipal ordinance passed pursuant to the authority of the state, abridging the privileges or immunities of the citizen or depriving a person or a corporation of property without due process of law, would be an act of the state prohibited by the constitution. When the federal jurisdiction is therefore invoked on the ground that the suit arises under the constitution and laws of the United States, it must appear that the suit really and substantially involves such a controversy. A mere claim in words is not enough.⁴ Thus if it appears that the real controversy between the parties is whether a municipal ordinance was enacted in conformity with the state constitution, the federal jurisdiction cannot be sustained.⁵ Under this principle the circuit court of appeals of the ninth circuit⁶ dismissed a bill

¹ *Siler v. L. & N. R. Co.*, *supra*.

² *Ex parte Young*, *supra*.

³ This original jurisdiction of the circuit court is vested in the district court of the United States under the revised judiciary act taking effect Jan. 1, 1912.

⁴ *Western Union Tel. Co. v. Ann Arbor R. R. Co.*, 178 U. S. 239, 44 L. Ed. 1032 (1900); *City of*

Memphis v. Cumberland Tel. & Tel. Co., 218 U. S. 624, 54 L. Ed. 1185 (1910).

⁵ *Hamilton Gas Light Co. v. Hamilton City*, 146 U. S. 258, 36 L. Ed. 963 (1892); *Barney v. City of New York*, 193 U. S. 430, 48 L. Ed. 737 (1904).

⁶ *Seattle Electric v. Seattle R. & S. Co.*, 185 Fed. 365 (1911).

of complaint which alleged that a certain municipal ordinance would take property and privilege without due process of law, and in contravention of the laws of the United States, and that the alleged ordinance is without authority of law, null and void, and of no force or effect, as it appeared that under the provision of the state constitution the ordinance would be as invalid as under the federal constitution, and the court would presume that the state court would not deny to any of its citizens the equal protection of the laws. The court said further that if they were mistaken the complainant would have his remedy from the appeal of the highest state court to the supreme court of the United States.

§ 114. Jurisdiction of the federal courts not limited by state legislation.—This power of the federal courts cannot be limited by state legislation. One who is entitled to sue in the federal circuit court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court; and he cannot be deprived of that right by reason of his being allowed to sue at law in a state court on the same cause of action. Thus a state statute, authorizing any railroad company in a proper action to show in an action brought in the supreme court of the state that the rates prescribed by a statute were unreasonable and unjust and to obtain relief therefrom, did not deprive the railroad company of its right to invoke the equity jurisdiction of the federal court.¹

This right to resort to the federal courts however irrespective of any remedy in a state court is to be distinguished from a case where the proceedings in the state court are not judicial, but are legislative or administrative in character. This was illustrated in the Virginia rate case, where the constitution of the state provided that the state corporation commission, which was styled a court, should fix rates subject to the right of appeal by the railroads to the supreme appellate court of the state, who should determine the case upon the facts certified by the commission, and if it reversed the order of the commission, should substitute such order as, in its opinion, the commission should have made. The court said that these were proceedings essentially legislative in character. As a matter of comity therefore a federal circuit

¹ *Smythe v. Ames, supra.*

court should not entertain a suit to enjoin the enforcement of rates fixed by the state corporation commission in advance of the appeal to the highest state court, so that the final voice of the state should have been declared before the federal authority was invoked.¹

An act of a state providing that the rates charged, established by a commission, shall be final and conclusive as to what are reasonable charges, and which, as construed by the supreme court of the state, precludes any judicial inquiry as to the reasonableness of the rates, deprives the company of its property without due process of law and of the equal protection of the laws.² The carrier is thus secured under the fourteenth amendment, not only in a judicial hearing upon the question of his intrastate rates, but also in his right to charge reasonable rates; and the reasonableness or unreasonableness of the rates established under state authority will be reviewed by the federal courts in determining whether or not the company is deprived of its property without due process of law.³

Due process of law does not require that a railroad should have notice of specific time of fixing rates if dates of meeting of the commission are fixed by law,⁴ nor is it essential that a judicial review of the order of the commission should be provided in the statute.⁵

§ 115. Injunctions against state officials not violative of the eleventh amendment.—A suit against a state commission or a state attorney general or any other state officials, acting under the authority of the state in fixing rates or enforcing regulations of a state, to enjoin them from proceeding in such

¹ *Prentiss v. Atlantic Coast Line*, 211 U. S. 210, 53 L. Ed. 150 (1908). The court held that the suits were prematurely brought; Justice Brewer dissenting, and Justices Fuller and Harlan holding that the suits should be dismissed.

² *Chicago, etc. R. Co. v. Minnesota*, 134 U. S. 418 (1890), 33 L. Ed. 970.

³ *Smythe v. Ames*, *supra*; *Reagan v. Farmers Loan & Trust*

Co. supra; *Chicago, Milwaukee & St. Paul R. Co. v. Tompkins*, 176 U. S. 167, 44 L. Ed. 417 (1900); *Covington & Lexington Turnpike Co. v. Sandford*, 164 U. S. 578 (1896), 41 L. Ed. 560.

⁴ *San Diego Land Co. v. National City*, 174 U. S. 739, 43 L. Ed. 1154 (1899)—a water rate case.

⁵ *L. & N. R. R. Co. v. Siler*, 186 Fed. 176, *supra*.

enforcement on ground of the invalidity of such regulation, is not a suit against the state within the meaning of the eleventh amendment.¹ This principle was enforced by the supreme court in a case where the attorney general of a state was held properly cited with contempt of a circuit court of the United States, when he had proceeded in his official capacity by suit in a state court in enforcing a state statute regulating state rates, after he had been enjoined by the circuit court from taking steps towards the enforcement of such statute, which was claimed to be unconstitutional. The court said: "Individuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings, either of a constitutional or a criminal nature to enforce against parties affected an unconstitutional act violating the federal constitution, may be enjoined by a federal court of equity from such action." While the power of the federal court does not extend to enjoining a state court from acting in a case brought before it, the action of an attorney general of a state in attempting to enforce an enactment void under the constitution of the United States was illegal, as in conflict with the federal constitution; and the prohibition against his proceeding did not affect the state in its governmental capacity.

§ 116. The regulating orders of state commissions are legislative, not judicial.—It is immaterial that the state commission or other authority charged with the duty of making rates is styled a court, and is made a court of record by the express terms of the constitution of the state. A suit to enjoin the members of such a commission is not a suit to enjoin a state court within the meaning of Section 720, R. S. U. S., nor does the decision of such a commission make the legality of the rates fixed or affirmed by them *res adjudicata*. The establishment of a rate is the making of a rule for the future, and therefore is an act

¹ *Ex parte Young*, 209 U. S. 123, 52 L. Ed. 714 (1908), Harlan, J., dissenting. The opinion of this case contains an exhaustive review of the authorities, and distinguished the case of *Fitts v. McGhee*, 172 U. S. 516, 43 L. Ed. 535 (1899), which was claimed to

overrule or limit the doctrine of *Smyth v. Ames*, *supra*; *Central R. of Georgia v. McLendon*, 157 Fed. Rep. 961 (1907); *McNeill v. Southern Railway Co.*, 202 U. S. 543 (1906), 50 L. Ed. 1142, modifying and affirming 134 Fed. Rep. 82.

legislative, not judicial, in kind. In the language of the supreme court, a judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. Legislation, on the other hand, looks to the future, and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. It follows, that when a state supreme court is vested with the rate making power on appeal from such a commission, its action is essentially administrative or legislative, and not judicial, and, therefore, is not constituted an adjudication in the judicial sense of the word;¹ and the enforcement of a rate or regulation thus made and affirmed, may be enjoined by the federal court, if found to be violative of the constitutional rights of the railroad.

It is immaterial that investigations or hearings are made by the commission or court, on appeal therefrom if such appeal is provided, as such matters are but preliminary and inducive to the exercise of the legislative power in the adoption of the new rule of action to be formulated and applied.²

§ 117 (96). Procedure in federal review of state legislation. The question of the validity of state rates or other regulation may be raised by carrier in defense to an action at law for the penalties imposed by the law,³ but preferably by bill in equity directly challenging the validity of the rates or regulation. It was said by the supreme court in the Minnesota rate case⁴ that the remedy at law in such a case was plainly inadequate, particularly when it involved a great risk of fines and imprisonment if it should finally be determined that the act was valid and that a railroad company should not be required to take this risk, and that all these objections will be obviated by a suit in equity, making all who are directly interested parties to the suit.

The circuit courts of the United States have jurisdiction of an action by non-resident stockholders of such companies against the companies and the state official contesting said imposed

¹ See the Virginia Rate Case, *Prentiss v. Atlantic Coast Line*, *supra*.

² *L. & N. R. R. Co. v. Siler*, *supra*.

³ See *St. Louis & S. F. R. R. Co. v. Gill*, 156 U. S. 6 (1895), 39 L. Ed. 567.

⁴ *Ex parte Young*, *supra*.

rates.¹ As the federal court has jurisdiction irrespective of citizenship where the basis of complaint is that the state rates or regulation are violative of due process of law under the fourteenth amendment, the court would have jurisdiction irrespective of citizenship, and the bringing of such an action in the name of the non-resident stockholders is therefore unnecessary.²

The federal jurisdiction may also be invoked through a writ of error from the supreme court to the highest court of the state where the federal right invoked is decided adversely to the claimant by the state court, or the jurisdiction may be exercised in a direct proceeding in the assertion of the federal right in the U. S. circuit court, and this latter procedure is ordinarily the only adequate remedy.³

As to the procedure in an equity cause, it was remarked by the supreme court⁴ that it was a better practice in such cases where the reasonableness of rates was involved, to refer the cause to some competent master to make all needed computations and to find fully the facts, and that in view of the difficulties and importance of such a case it was imperative that the most competent and reliable master, general or special, should be selected; for it is not a light matter, said the court, to interfere with the legislation of the state in respect to prescribing rates, nor a light matter to permit such state regulation to wreck large property interests.⁵

The supreme court has declared a modification of the ordinary procedure in equity causes in a case involving the alleged confis-

¹ Reagan v. Farmers Loan & Trust Co., *supra*.

² As to the compliance with equity rule 94 in a stockholder's suit, see Poor v. Iowa Central R. R. Co., 155 Fed. Rep. 226 (1907), where the court held that such a suit could not be maintained where the only effort of the plaintiff to secure his action from the company was a demand on the stockholders, and that the manner or reason for the refusal of the directors was not disclosed.

³ See *Ex parte Young*, *supra*.

⁴ See South Dakota Rate Case, 176 U. S. 167 (1900), 44 L. Ed. 417, reversing 90 Fed. Rep. 363.

⁵ As to sufficiency of allegations in the bill of complaint to restrain enforcement of an order of the commission reducing rates, see Wilmington & W. R. Co. v. Board of R. R. Commissions, 90 Fed. Rep. 33 (1898). See also Houston & T. C. R. R. v. Story, 149 Fed. Rep. p. 499 (1906); Oregon R. R. & Navigation Co. v. Campbell, 173 Fed. 957, circuit court of Oregon (1909), also 177 Fed. 318.

catory rates fixed by a municipal ordinance of a local public service company, in that the general rule respecting the conclusiveness of a master's finding of fact when confirmed by the court would not be applied by the supreme court on appeal, that is, the court would not fetter its discretion or judgment by any artificial rules as to the weight of the master's findings, however useful and well settled these rules might be in ordinary litigation.¹

Where the order of the commission, sought to be enjoined, commands the repayment by the railroad of excessive past rates to certain shippers, such shippers are necessary parties to a bill seeking to set aside the award.²

The exceptional character of this litigation is also peculiar in the provision of the decree which the supreme court said in the Nebraska case was wisely inserted,³ that the members of the state board had the right to show at any time that the conditions of business were so changed, that the rates enjoined would yield the railroads a just compensation; and in such case it would be the duty of the court to discharge the injunction. This precedent thus approved by the supreme court, has been usually followed in decrees in this class of litigation.⁴

§ 118. **Temporary injunctions in federal control of state legislation.**—Where a federal court has jurisdiction to permanently enjoin the enforcement of railroad rates or other regulations, it also has power, while the inquiry is pending, to grant a temporary injunction to the same effect.⁵ Such temporary relief is granted upon the same grounds recognized as authorizing such relief in other cases, that is, to preserve the status quo and prevent a change of conditions during the litigation which may result in irremediable injury to some of the parties before their claims can be investigated and adjudicated.⁶

¹ Knoxville v. Knoxville Water Co., 212 U. S. 1, 53 L. Ed. 371 (1909).

² L. & N. R. R. Co. v. Siler, *supra*.

³ See Smythe v. Ames, *supra*.

⁴ The necessity of adjusting orders concerning rates to the probability of changing business conditions, is shown in the provi-

sion of the Interstate Commerce Act limiting the orders of the commission for periods of two years.

⁵ Ex parte Young, *supra*.

⁶ City of Newton v. Lewis, 79 Fed. Rep. 715 (1897); Stevens v. M. K. & T. R. R., 106 Fed. Rep. 771 (1901), C. C. A. 2nd circuit; Cartersville L. & N. Co. v. Carters-

This principle has been applied by the courts in determining the right to a temporary injunction in railroad rate cases.¹ In what is known as the Alabama rate case, the circuit court of appeals, fifth circuit, reversed the order of temporary injunction granted by the circuit court where the rates had not gone into effect.² The circuit court of Minnesota declined to issue a preliminary injunction where the rates had been accepted and put in operation by the railroad companies, but allowed a temporary injunction as to certain rates which had not been put into effect, for the reason that they operated so as to preserve the status quo as to whether or not the rates were confiscatory until the final hearing.³

Where the enforcement of rates has been restrained by a restraining order pending the hearing of application for temporary injunction, the court, in denying the injunction, may in its discretion continue the restraining order upon condition, pending an appeal.⁴

§ 119. Temporary injunction under act of 1910.—Under the act establishing the circuit court of appeals, as amended, an appeal lay to that court from orders granting temporary injunctions, whether the causes were appealable on final hearing to such court or to the supreme court. Under the commerce court act of 1910,⁵ temporary injunctions against the enforcement of

ville, 114 Fed. Rep. 699 (1901), same court; Louisville v. Cumberland Tel. Co., 111 Fed. Rep. 663 (1901), C. C. A. 6th circuit.

¹ Central of Georgia Ry. Co. v. McLendon, 155 Fed. Rep. 974 (1907), and 157 Fed. Rep. 961.

² 170 Fed. Rep. 225, reversing 161 Fed. Rep. 925.

³ Perkins v. Northern Pac., 155 Fed. Rep. 445 (1907). See also St. L. & S. F. R. R. Co. v. Hadley (a Missouri rate case), 155 Fed. Rep. 220. where the temporary injunction was denied because the rates had not been tested. In the Oklahoma rate cases a temporary injunction was granted by Hook, J., on the ground that the passenger,

and freight rates had been enforced for two years, and, on the affidavits, were held to be confiscatory. A. T. & S. F. R. R. Co. v. Love, 177 Fed. 493, affirmed by Circuit Court of Appeals (8th Cir.), 185 Fed. 321 (1911).

⁴ L. & N. R. R. Co. v. Siler, 186 Fed. Rep. 175, *supra*.

⁵ See Appendix. On hearing under this act of 1910 before Circuit Justice and two District judges, where application for temporary injunction against state rates of Nevada was denied on ground of insufficiency of proof. See Woodside v. Tonopola R. R., 184 Fed. Rep. 358 (1911).

state authority by state officials cannot be granted by the federal courts, unless the application shall be heard and determined by three judges, one of whom must be a justice of the supreme court or a circuit judge, and at least five days' notice of the hearing must be given to the governor or attorney-general; and such orders of injunction are appealable directly to the supreme court.

Under this act, an acting district judge cannot sit alone, either in granting an injunction order, or in vacating one which has been made, but he must call to his assistance two other judges, as required by the statute, to hear an application, either to grant or to vacate such an injunction. Mandamus to compel the judge to comply with the law is the proper remedy, where a single judge takes any action on such an injunction, as the right of appeal is not otherwise given by statute.¹

§ 120 (97). Reasonableness and confiscation in regulation of rates.—The standard of reasonableness in rates considered by the courts when the carrier complains of state imposed rates on intrastate traffic as confiscatory, in violation of the fourteenth amendment, is not the same as that involved in the determination of what is reasonable between a carrier and his patrons, whether the issue is raised under the interstate commerce act or otherwise. It is not what the carrier can exact or what the shipper can be forced to pay under the common law rule of reasonableness, but what limit the state can lawfully impose upon the carrier in making rates without violating the federal protection against taking of property without due process of law.

The burden of proof necessarily differs in the different classes of cases. When the federal authority is invoked against state imposed rates the presumption is that the state rates, whether made by the legislature or a commission, are presumed to be reasonable, and the burden is therefore upon the railroad to prove that the rates are unreasonable, that is confiscatory, in that they deprive the railroad of the rightful return to which it is entitled

¹ Ex parte, in re Metropolitan Water Co. of West Virginia, 220 U. S. 539, 55 L. Ed. — (1911), where a mandamus was issued, directing the acting district judge of the district of Kansas to set aside an order vacating an injunc-

tion order, and directing him to call to his assistance two other judges, as provided by the act, for hearing and determining an application for an interlocutory injunction.

upon its property. If the railroad fails to prove this contention the suit must fail.¹ The term "reasonable" in this class of actions is used in the sense of being non-confiscatory, that is, above the minimum which the railroad could be compelled to accept; and such a rate may be well within the maximum rate which a railroad could exact from its patrons as reasonable.²

On this issue therefore of the minimum rate which the carrier can be forced to charge the proof is necessarily directed to show that the rates will not permit the carrier to realize the adequate return to which it is lawfully entitled, upon its property devoted to the public use.

On the other hand neither the statutes nor the common law nor judicial decisions concerning state imposed rates furnish any definite standard for the determination of what is reasonable as between a carrier and its patrons. In ordinary business transactions a reasonable charge for a personal service is the resultant of the free economic forces of supply and demand. It is obvious that under the complicated conditions of railway transportation this free play of the economic forces of supply and demand does not ordinarily exist. When competition does act in determining railway rates, it is only at certain points, as terminal centers, where the rate may be made unreasonable from the carrier's point of view, while at local points on the same line it may not exist at all. The standard of reasonableness therefore is one thing for the railroad manager who wishes to secure at all times a reasonable profit upon the cost of services, and a

¹ In *Northern Pacific R. R. v. North Dakota*, 216 U. S. 579, 54 L. E. 624 (1910), the supreme court, in affirming the judgment of the state court which sustained a coal rate which was alleged to be confiscatory, said that while the argument of the railroad seemed to have considerable probability, the evidence left the matter so much in doubt, that the decree was affirmed without prejudice to the rights of the company to reopen the case, if after adequate trial, it thought it could prove the

confiscatory character of the rate more clearly.

² "What may be a reasonable rate or return as in the matter of legal policy, having due regard to encourage the investment of capital in railroad enterprises, is one question; but when the inquiry becomes a judicial problem to be considered as involving the taking or not taking the railroad's property, it is essentially a different question." Opinion of circuit court in *L. & N. R. Co. v. Siler*, *supra*.

very different thing for the shipper who wishes to secure at all times a reasonable profit for his own business as against his competitors in other communities.¹

§ 121 (98). **State rates determined without reference to interstate traffic.**—The complexity of our governmental system is illustrated in the regulation of the intrastate and interstate business of our railroads. Though the railroad may extend through several states, it is an entity operated as an entirety, all its income coming into and all its expenditures going out of a common fund, its capitalization includes all its property in and out of the state, and all its business, state or interstate, is transacted by the same employes and with the same equipment. All this, says the supreme court, has no application in determining the limits of the state power of regulation.² The reasonableness of state rates, that is, whether or not confiscatory, must therefore be determined by the revenue from and the cost of traffic within the state without reference to the interstate traffic over which the state has no control. A state cannot justify unreasonably low rates on the ground that the railroad is earning large profits in its interstate business, nor can the railroad justify unreasonably large rates to domestic business in order to make up losses on its interstate business. This principle precludes the state from claiming that traffic beginning or ending in the state should be divided upon the mileage basis, as such interstate traffic

¹ The supreme court said in the *Trans-Missouri Freight Association* case, *supra*, "What is a proper standard by which to judge the fact of reasonable rates?" And after commenting upon the different factors to be considered, said: "That it is quite apparent that it is exceedingly difficult to formulate even the terms of the rule itself which should govern in the matter of determining what would be reasonable rates for transportation, and that there was such an infinite variety of facts entering into the question of what is a reasonable rate, no mat-

ter what standard is adopted, that the individual shipper would be practically remediless. It is also true that the complexity of the problem requires for its solution the largest experience, and the fullest knowledge of the details of the cost of service, and all the conditions of traffic." The question of reasonableness in railroad rates and the different factors involved in its determination is fully discussed in the opinions of the Interstate Commerce Commission, see *infra*, § 246 *et seq.*

² *Smyth v. Ames, supra.*

under the decision in the *Wabash* case,¹ is subject only to the regulation of congress.²

The judicial investigation of the validity of state rates therefore requires what is in effect a statement of account of the state business of the railroad, and its segregation from the other business of the railroad, conducted with the same equipment. The railroad property in the state must be ascertained and apportioned to the state and interstate business, and if the case requires it, separately apportioned to the freight and passenger business, both state and interstate. It was said by the supreme court in holding that in such a case the cost and net profits of the state traffic must be ascertained³ that few cases are so difficult and perplexing as those which involve an inquiry whether the rates prescribed by the state legislature for the carriage of passengers and freight are unreasonable, but that the facts could not be determined with mathematical accuracy afforded no excuse for a failure to examine and solve the question involved.

§ 122. The supreme court on state regulation.—The regulation by the states of intrastate rates in the exercise of its authority over domestic commerce has been reviewed by the supreme court in this jurisdiction under the fourteenth amendment in cases from Texas,⁴ Nebraska,⁵ South Dakota,⁶ Arkansas,⁷ Michigan,⁸ Minnesota,⁹ Florida,¹⁰ and Virginia.¹¹

The principles applied in determining the validity of railroad rate regulation have also been discussed in connection with the

¹ See § 37, *supra*.

² See *Northern Pacific Railroad Co. v. Keyes*, C. C. D. of North Dakota, 91 Fed. 47 (1898).

³ See *South Dakota Rate Case*, *C. N. & St. P. R. Co. v. Tompkins*, *supra*.

⁴ *Reagan v. Trust Co.*, *supra*.

⁵ *Smyth v. Ames*, *supra*.

⁶ *Chicago, M. & St. P. R. Co. v. Tompkins*, *supra*.

⁷ *St. L. & S. F. R. Co. v. Gill*, *supra*; *Dow v. Bidelman*, 125 U. S. 680, 31 L. Ed. 841 (1888).

⁸ *Chicago Grand Trunk R. Co.*

v. Wellman, 143 U. S. 339 (1892), 36 L. Ed. 176.

⁹ *Chicago, etc., R. Co. v. Minnesota*, 134 U. S. 418, 33 L. Ed. 970 (1890); *Minn. & St. L. R. Co. v. Minnesota*, 186 U. S. 257, 46 L. Ed. 1151 (1902).

¹⁰ *Atlantic Coast Line R. Co. v. Florida*, 203 U. S. 256, 51 L. Ed. 174 (1906); also *Seaboard Air Line v. Florida*, 203 U. S. 261, 51 L. Ed. 176 (1906).

¹¹ *Virginia Rate Case*, *supra*, § 114.

rates imposed by the states or municipalities under state authority upon other public service corporations.¹

In the Texas rate case, the supreme court reversed the decision of the circuit court in so far as it restrained the railroad commission from discharging the duties imposed by the legislative act and from proceeding to establish reasonable rates, but affirmed the decree in so far as it restrained the commission from enforcing the rates already established, as it was found upon the admitted facts that the rates failed to return an adequate compensation. The enforcement of the state rates was also enjoined in the Nebraska case on the same ground; and in the South Dakota case the decree of the circuit court refusing to enjoin and dismissing the bill of the railroad company was reversed on the ground that the circuit court had failed to determine the reasonableness of the rates, and the case was remanded with directions for such determination by ascertaining the cost of the state business. In the other railroad cases, where the merits of the appeals were considered, it was ruled that the railroad companies had failed to overcome the presumption of reasonableness of the rates fixed by the state authority.²

§ 123. Schedules of rates and special rates.—The federal authority as illustrated in the cases determined by the supreme court has been invoked in two distinct classes of cases. That is, where the entire schedule of maximum rates, both freight and passenger, is fixed by state authority, and where there is not an entire schedule, but the maximum rates are fixed upon specific

¹ See *Kentucky Turnpike Case*, 164 U. S. 578, 41 L. Ed. 560 (1896); and *San Diego Water Rate Case*, 174 U. S. 739, 43 L. Ed. 1155 (1899); *The Stockyards Case*, 183 U. S. 79, 46 L. Ed. 92 (1902); the *Knoxville Water Case*, 212 U. S. 12, 53 L. Ed. 371 (1908); the *Consolidated Gas Case*, 212 U. S. 19, 53 L. Ed. 382 (1908).

² The *Minnesota Rate Case*, *Shepard v. Northern Pac. R. Co.*, *supra*, § 110; the *Missouri Rate Case*, *supra*, § 110; the *Arkansas Rate Case*, *supra*, § 110; the

Kentucky Rate Case, *supra*, § 110, have all been appealed to the supreme court and are set for hearing at the October term, 1911. These cases all involve general schedules of rates, both freight and passenger. Rate cases are also pending in the supreme court from Nevada, 170 Fed. Rep. 752; from Kentucky, *supra*, § 110, and Oregon, *supra*, § 110. Other cases are pending in the circuit courts, not yet passed to final decree, in Oklahoma, Iowa, Kansas and North Dakota.

classes of commodities. In cases under the Interstate Commerce Act, as will be hereafter seen, it is as a rule the latter class of cases which is involved; that is, the reasonableness of the rates on specific commodities, or to or from specific localities, or more usually the relation of rates as between competing communities or kinds of traffic is brought under review.¹

When the state authority is challenged on the ground that the railroad is deprived of an adequate return upon its property, the difficulty of determining this issue is very much increased when the reduction complained of is only upon a single commodity or a single class of freight. Such a reduction cannot be shown to be unreasonable, that is confiscatory, simply by proving that if the same reduction were applied to all classes of freight the railroad would fail to receive a proper return; and in such cases the railroad must show that this reduction would of itself prevent its securing an adequate return upon its property in the state. The supreme court said "in such a case the great difficulty in the attempt to measure the reasonableness of charges with reference to the cost of transporting a particular class of freight is well known and has often remarked."²

¹ In such cases as in the recent proposed general advance of rates, general schedules are of course involved, see *infra*, page 256.

² Northern Pac. R. Co. v. North Dakota, 216 U. S. 579, 54 L. Ed. 624 (1910). This was a case where the railroad was charged with a continuous violation of the law fixed for the carriage of coal through the state. The supreme court said the question of reasonableness left the matter in so much doubt that the decree of the state court was affirmed without prejudice to the right of the railroad company thereafter to reopen the case for a trial in court proving more fairly the confiscatory character of the rates proposed.

In Minneapolis & St. Paul R. R. Co. v. Railroad Commission, *supra*,

the court sustained a rate on coal from the northern corner of the state to the southern part of the state requiring a transfer from one railroad to another. The court said a state could authorize its railroad commission to reduce an unreasonable joint through rate agreed upon between two or more roads and apportion the same between the railroads interested, and added:

"It was not necessarily entitled to earn the same percentage of profit on all classes of freight carried. . . . We do not think it beyond the power of the state to reduce the rate upon a particular article provided the companies are able to earn a fair profit upon their entire business, and the burden is upon them to impeach the action of the commis-

§ 124. **The valuation of railroad property in state regulation.** Where the validity of a regulation under state authority is questioned and a railroad or any public service corporation is involved, the valuation of the property of the company must necessarily be ascertained.

In some cases the value of the railroad property in the state has been ascertained from the value fixed for taxation by assessing boards, the relation of the assessed value and the actual value being duly shown or agreed upon.¹ In states—where railroads are not taxed through property valuation but through some form of tax upon earnings, this means of valuation is not available, and the value therefore must be separately ascertained.²

The supreme court has laid down the general rule that in determining value in cases of state regulation, it is not the original cost of the property, but the value at the time of regulation; that is, the cost of reproduction, which is the test; that is, not the expenditure which was made to produce, but the expenditure

tion in this particular. . . . The commission was not bound to reduce the rate upon all classes of freight. They have the right to reduce it upon any specific article; and if, upon examining the tariffs of a certain road, the commission is of opinion that the rates upon a particular article or class of freight is disproportionately or unreasonably high, it may reduce such rate, notwithstanding that it may be impossible for the company to determine with mathematical accuracy the cost of transportation of that particular article as distinguished from all others. Obviously, such reduction could not be shown to be unreasonable simply by proving that if applied to all classes of freight it would result in an unreasonably low rate."

In *Atlantic Coast Line R. Co. v. Fla.*, *supra*, the court, affirming 48

Fla. 146, in refusing to disturb a local rate on phosphate, said: "We are aware of the difficulty which attends proof of the cost of transporting a single article, and in order to determine the reasonableness of a rate prescribed it may some times be necessary to accept as a basis the average rate of all transportation per ton per mile." It appeared in another case, that of the *Seaboard A. L. Ry. v. Fla.*, *supra*, that the maximum phosphate rate fixed by the commission was materially larger than the average freight rate per ton per mile. See also *Chicago & G. T. R. Co. v. Wellman*, *supra*; *St. Louis & S. F. R. R. Co. v. Gill*, *supra*; *Southern Ry. Co. v. McNeil*, *C. Ct. of N. C.*, *supra*.

¹ See *Missouri Rate Case* and the *Arkansas Rate Case*, *supra*.

² See the *Minnesota Rate Case*, *supra*.

that will be necessary to reproduce the property.¹ This principle that it is the present value of property that must be considered involves the further question of the right of the railroad or other quasi public corporation to demand a return upon the increased value of its property, including what is termed the "unearned increment."²

This right, however, is obviously controlled by the limitation of the carrier to reasonable rates; that is, no increase in the value of property can justify the carrier in a rate which is unreasonable to the public. This qualification was distinctly declared by the supreme court in the consolidated gas case.³

In the valuation of property for rate regulation the ultimate fact of value and the relevancy of evidence to prove value must be distinguished. Thus in the Nebraska rate case,⁴ the court said that in determining value as the basis for making rates, capitalization,⁵ the original cost of construction, the amount expended in permanent improvements, the amount and market

¹ See *Smyth v. Ames*, *supra*.

² See discussion of this subject by the Interstate Commerce Commission with reference to the recent proposed advance of freight rates, *infra*, § 169.

³ From opinion of supreme court in this case, 212 U. S. 52 (1909): "And we concur with the court below in holding that the value of the property is to be determined as of the time when the inquiry is made regarding the rates. If the property which legally enters in to the consideration of the question of rates has increased in value since it was acquired, the company is entitled to the benefit of such increase. This is, at any rate, the general rule. We do not say there may not possibly be an exception to it where the property may have increased so enormously in value as to render a rate permitting a reasonable return upon such increased

value unjust to the public. How such facts should be treated is not a question now before us, as this case does not present it. We refer to the matter only for the purpose of stating that the decision herein does not prevent an inquiry into the question when, if ever, it should be necessarily presented.

⁴ *Smyth v. Ames*, *supra*.

⁵ In the *Knoxville Water Case*, *supra*, involving the validity of the rates imposed upon a municipal water company, the court said that capitalization afforded no guide to the present value of the property, where substantially all the common and preferred stock was issued under construction contracts entered into with persons who controlled the corporate action, and was generally in excess of the true value of the property furnished under the contracts.

value of bonds and stocks, the present as compared with the original cost of construction, the probable earning capacity under the rates, the sum required to operate the business, are all matters to be considered and must be given such weight as may be just and right in each case, and the court concluded by saying: "We do not say that there will not be other matters to be regarded in estimating values."

The decisions of the supreme court and other tribunals on questions of valuation in the rate cases, where the question at issue is as to the reasonable return a corporation is entitled to receive under a public regulation of rates, must be distinguished from eminent domain and analogous cases, where a right of purchase of the property of public utility companies is exercised by municipalities under reserved contract rights;¹ and also from cases of valuation for taxation, where the ascertainment of relative value under construction of statutory standards is involved.

§ 125. The apportionment of railroad property in state regulation.—In the case of an interstate railroad where the lines may extend over several states, the problem is complicated as the value of that part of the property which is located in the state must be ascertained, and when ascertained, must be apportioned as between the state and federal business which is conducted with the same tracks and the same equipment.

The most direct and simple method of apportioning to a state the value of the interstate railroad located therein is on a basis of mileage, and this method has been approved as a *prima facie* basis for taxation, both as to tangible and intangible property.² But this basis has obvious limitations both in rate regulation

¹ See *Omaha v. Omaha Water Co.*, 218 U. S. 180, 54 L. Ed. 991 (1910), where the court said that an option to purchase excluded any value on account of unexpired franchise, but did not include the value as a going concern; *Knoxville Water Co. Case*, *supra*; *Wilcox v. Consolidated Gas Co.*, *supra*; *The Kansas City Waterworks Case*, 62 Fed. Rep. 853, C. C. A.

(1894), 8th Circuit; *San Diego Co. v. Jasper*, 189 U. S. 439 (1903), 47 L. Ed. 892, affirming 110 Fed. Rep. 702, as to municipal regulation of irrigation rates.

² *West, Union Tel. Co. v. Massachusetts*, 125 U. S. 530 (1888), 31 L. Ed. 790; *Adams Express Co. v. Ohio*, 165 U. S. 194 (1897), 41 L. Ed. 683.

and in taxation, and its application may do grave injustice. Thus where the railroad extends through a state where it has very valuable terminal property and runs through a rich populous section, while in another state it has no such property and runs through a poorly developed country, the apportionment on a mileage basis would be clearly inapplicable.¹ Other methods therefore are suggested, such as the apportionment basis upon the gross or net revenues.

Not only must there be an apportionment in determining the state value, if it is based upon the general value of the railroad system, but on the issue of an alleged confiscatory state regulation there must be an apportionment of that state value to the state and interstate business carried on with the same property and equipment. This has been done on what is known as the revenue basis; that is, the value of the property is apportioned according to the state and interstate business. Where the regulation complained of affects only the passenger or freight business, there must be a still further apportionment of this state and interstate value of the state property as between the passenger and the freight business, both state and interstate.²

§ 126. Confiscation in state regulation; how proved.—Assuming that the proportionate property in the state has been approximately ascertained and apportioned to the different classes of traffic, state and interstate, the determination of a claim of confiscation then requires that the net revenues of the state as distinguished from the interstate business, must be ascertained. The sources of the different classes of revenue, whether state or interstate, passenger or freight, can be determined with accuracy from the records of the railroad company.

In order to ascertain the net revenues derived from the intrastate business the cost of conducting the intrastate as distinguished from the state business must still be ascertained.³

¹ See an interesting and able discussion of this subject by Prof. B. H. Meyer, now of the Interstate Commerce Commission and formerly of the Wisconsin Railroad Commission, in "The Methods for the Distribution of Railway Values Among States, Bulletin No.

21 Census Bureau (1905) Government Printing Office."

² See *Arkansas Rate Case supra*; *Missouri Rate Case, supra*; *Minnesota Rate Case, supra*.

³ In the *South Dakota Rate Case, supra*, where the court reversed the judgment of the circuit

As the property and equipment are used for all classes of traffic, there is no separate record in the company's books of the cost of doing any specific class of business; and such separate cost, therefore, can only be ascertained by what is known as the revenue theory, wherein the cost of each class of traffic is estimated by apportioning the total cost in proportion to the revenue derived from each class of traffic, or the cost of each class of traffic is estimated by "allocating" such expenses as can properly be charged to any class of traffic and distributing the remaining cost upon such determined units as the cost per ton mile and the cost per passenger mile.¹

court, 90 Fed. Rep. 636, the failure to ascertain the cost of doing a local business, the court said that the inability to ascertain the cost with mathematical accuracy was no reason for not determining the cost from the best evidence obtainable.

¹ *The revenue theory and ton mile theory.* See a very thorough discussion of these different methods of estimating the cost of different classes of traffic by the Wisconsin State Commission in *Buell v. C. M. & St. P. R. R.*, 1 Wis. Commission R. R. Report, 324.

See also McPherson, J., in *St. Louis & S. F. R. Co. v. Hadley*, Missouri Rate Case, *supra*; Farrington, J., in the Nevada Rate Case, *supra*; Vandeventer, J., in Arkansas Rate Cases, 163 Fed. Rep. 141; Sanborn, J., in Minnesota Rate Case, 184 Fed. Rep. 765. See also report of Master in this case.

In the Oklahoma Rate Case the circuit court of appeals, 8th circuit (1911), 185 Fed. 329, approved the revenue theory as the more reasonable and equitable. It was conceded that cases could be imagined as suggested by the supreme court in the South Dakota Case,

176 U. S. 167, wherein the results did not seem to be perfect, but the ton mile theory was open to objections, and the revenue basis appeared more persuasively to the reason than any other.

See Hook, J., in same case, in circuit court, 177 Fed. l. c. p. 498.

In the Arkansas Rate Case, 187 Fed. Rep. 292, l. c. 320 (1911), the court, Trieber, J., said that a careful consideration of the facts showed that neither of these theories would produce approximately correct results if no other factors were taken into consideration. The straight revenue theory did not take into consideration the increased rates charged for intrastate traffic. The ton mile theory did not consider the additional expense of the local business. The court concluded that the fairest method was to apportion the cost of maintaining the way and structures of the railroad between the intrastate and interstate business on the earnings from the two classes of business, while the cost of locomotive and car maintenance which should be charged to each class of business, could be more nearly approximated by using the car mile basis. Such expenditures

If it appears that the cost of conducting the intrastate business is greater proportionately than the interstate business, allowance may be made for such extra cost from the best evidence obtainable.¹

as could be definitely assigned to the intrastate and interstate business, were allocated" accordingly.

¹ *The comparative cost of intrastate and interstate business.* The contention is made and recognized with approval in several cases, see South Dakota Rate Cases, *supra*, and the Nebraska Rate Case, *supra*, and by Vendeventer, J., in the Arkansas Rate Case, 163 Fed. Rep. 141, that the production of a given amount of revenue is attended with greater cost in intrastate business than in interstate business. In the Minnesota Rate Case, *supra*, the court said that there was an increased cost in the additional fuel consumed and increased wear and tear of machinery on each train involved in the stopping at every station. As to the rulings of the commission on through and local rates under the Interstate Commerce Act, see *infra*, § 180. While local rates are usually intrastate rates, and through rates interstate rates, this is not always the case, particularly in respect to passenger traffic. Where a large city is located at or near a state boundary extensive suburban local business may be interstate business, while through express trains from one end of the state to the other will be intrastate. The estimates of experts as to the increased cost of intrastate business in reported cases differ widely, dependent in some cases largely upon local conditions.

In the Minnesota Rate Case, 184 Fed. Rep. 765, the court affirmed the report of the master that the cost of doing intrastate business, was two and one-half times more than the cost of doing interstate business, and that the cost of doing intrastate passenger business was fifteen percent more than the cost of doing interstate passenger business.

In the Oklahoma case it was said by Hook, J., 177 Fed. Rep. 1 c. 499, that it was claimed by the railroad men that the cost of local freight traffic was from two to eight times as much as that of interstate traffic, and of local passenger traffic from twenty-five percent to fifty percent more, but it was probable that the difference mentioned in the freight traffic should not be fully applied in a division of cost on the revenue basis, for there the difference found expression in a measure in the relative revenue proportions.

In the Arkansas Rate Case, *supra*, the court found that the total difference in cost between intrastate and interstate freight was two hundred and ten percent in favor of the intrastate. This was after deducting the increased revenue; and on the same basis the increased cost of the intrastate passenger service was ten percent net greater than that of the interstate passenger.

§ 127. Rate of profit necessary to avoid charge of confiscation.—When the value of the investment in the state and the net revenue realized thereon under the established rates have been ascertained, this net revenue must be compared with the rate of profit which the railroad is entitled to realize upon such an investment. The rule is laid down by the supreme court in the New York City gas case,¹ that there is no particular rate of compensation which must in all cases and in all parts of the country be regarded as sufficient for capital invested in business enterprises. Such compensation must depend greatly upon circumstances and locality and above all upon the amount of hazard in the enterprise. Under the facts of that case in view of the absence of competition the court held that a rate which would permit a return of 6 per cent. would be enough to avoid a charge of confiscation.

In the California water rate case² the supreme court held that a reduction of water rates by a board of supervisors so as to give an annual income of 6 per cent. of the then value of the property of the water company actually used to supply water to the public, did not necessarily amount to a taking of property without due process of law.

In Minnesota rate case³ where the state legal rate of interest was 6 per cent. in the absence of contract and 10 per cent. under contract, the court, Sanborn, J., affirmed the report of the master holding that the railroad companies were entitled to a net return of 7 per cent. per annum upon their respective properties. The court said that in view of the fact that the business was subject to public regulation a railroad should be permitted to receive a return sufficient to accumulate a reasonable surplus for times of depression and to maintain the character of their service. The court, therefore, held that 7 per cent. upon the values of the property in Minnesota was no more than the railroads were entitled to under the constitution of the United States.

In the Arkansas rate case⁴ the court based its conclusion that the railroads were entitled to a return of 6 per cent. upon

¹ Wilcox v. Consolidated Gas Co., *supra*.

² Stanislaus v. Joaquin, 192 U. S. 204, 48 L. Ed. 406 (1904), reversing 113 Fed. Rep. 390.

³ See Shepard v. Northern Pac. R. Co., *supra*.

⁴ See 187 Fed. Rep. 290 (1911).

the actual value of the investment in that state, regardless of capitalization, upon the finding that the roads were efficiently and honestly managed and traversed a fertile agricultural section with natural resources sufficient to justify their construction and that the cost of building was not greater than the average cost of roads in the southwest. In this case, in addition to the 6 per cent., an allowance of $1\frac{1}{2}$ percent. additional in prosperous times where there were no extraordinary losses by casualty was made.¹

In the circuit court of Kentucky² a telephone company was held entitled to set aside as a reserve a sum equal to 7 per cent. of the value of its property devoted to public use, exclusive of real estate, working cash capitals, supplies on hand, and to enjoy a net revenue equal to 7 per cent. on all its property. This was the case wherein there was serious opposition and the rates were so reduced by ordinance that it could not make such earnings, and the enforcement of the ordinance was enjoined.

The principle announced in all these cases is that no uniform rule as to rate of profit can be declared, but that each case must be judged upon its own facts. In the words of the supreme court, the public service corporation, which owes duties to the public as well as to the stockholders, has no right to any specific rate of dividend upon its capital stock,³ without reference to the rights of the public, and that the public could not properly be subjected to unreasonable rates in order simply that stockholders may earn dividends.

§ 128 (100). Protection of the carrier against discriminating state regulation.—The fourteenth amendment protects the carrier not only against unreasonable state limitation of rates, but also against any state legislation, which unreasonably interferes

¹ See also discussion of this subject in the investigation of advances in rates by the Interstate Commerce Commission (1911), 20 I. C. C. R. 307, 336 as to the Western cases, and 20 I. C. C. R. 243 as to the Eastern cases. In the latter case it was said on the assumption that the capital did not exceed its actual value, that the sum remaining after permitting

of fixed charges including as a fixed charge the dividend upon the preferred stock should be equivalent to between seven and eight percent on the common stock including amount carried to surplus fund.

² *Cumberland v. City of Louisville*, C. C., N. D. of Ky. (1911).

³ *Turnpike Road Co. v. Sanford*, 164 U. S. 578, 41 L. Ed. 560.

with the carrier's right to carry on and manage its concerns. This federal guaranty may be invoked, irrespective of whether there is any contract between the state and the company exempting it in any measure from state control. While the carrier is subject to the general police power of the state in the general conduct of its affairs, the running of its trains and providing for the proper accommodation of the public, it cannot be subjected to discriminating or class legislation. Thus, a statute of Michigan which provided that the railroads should keep for sale one-thousand mile tickets good for two years at a reduced rate, such tickets to be issued in the name of the purchaser's wife and children when desired, and redeemable by the company if not used, was held violative of due process of law and the equal protection of the laws. The court said that such legislation was not included in the power to fix maximum rates, and that the company had the right to insist that all persons should be compelled to pay alike and that no discrimination against it in favor of certain classes of married men with families, excursionists or others should be made by the legislature.¹

The same principle has been applied in holding invalid a statute requiring a railroad company to deliver its cars to another company from and to any point, where there was a physical connection between the tracks, without adequate protection of the law or undue detention and without securing due compensation. It was held that adequate provision for compensation should be made in the law itself, and the defect could not be cured by inserting such provisions in judgments in the discretion of the court.²

A railroad company cannot be compelled, at its own expense and without preliminary hearing, to construct side tracks or

¹ *Lake Shore & M. So. R. Co. v. Smith*, 173 U. S. 684 (1899), 43 L. Ed. 858. Three justices dissenting. The court in this case distinguished the lawful exercise of the state power in the enactment of reasonable state regulations for the public interest in a case of the same company, at the same term. *R. R. Co. v. Ohio*, 173 U. S. 285, 43 L. Ed. 702 (1899),

where it sustained the statute of Ohio requiring a railroad company to cause three of its regular passenger trains to stop at a station containing over 3,000 inhabitants. See *supra*, § 31.

² *L. & N. R. Co. v. Central Stock Yards Co.*, 212 U. S. 133 (1908), 53 L. Ed. 441, reversing 30 Ky. L. R. 18.

switches necessary to reach grain elevators which may be erected adjacent to the right of way, even if the statute was construed as only providing for cases where the demand for the facility was reasonable. The court based its opinion however, upon the absence of preliminary hearing and compensation.¹ The court said in its opinion that it did not intend to prejudice a later amendment providing for a preliminary hearing and compensation, which was said to have been passed.

§ 129 (101). The state power of regulation not limited to rates.—The power of the state, in its control of domestic commerce, to fix maximum rates subject to the judicial determination of their reasonableness also includes the power to make any reasonable regulations for the conduct of the carriers' business, subject to the judicial determination of what is reasonable. Thus discriminations may be prohibited, the requirement of facilities for the transfer of freight by direct connection at the intersection of railroads may be required,² and the reasonableness of contracts of the carriers, whether such contracts be made directly with the patrons of the road or for a general arrangement between railroads in the transportation of persons and property, are properly subject to state control.³ The consolidation of parallel or competing lines of railway may be prohibited.⁴

While a charter contract not containing a reservation on the part of the state of the right to alter or amend is protected by the federal constitution against impairment by subsequent legislation, the right may be reserved by the state to alter, amend or repeal the charter contract. In such cases the rights vested in the corporation by the terms of the charter contract may be modified by subsequent legislation, though this right of impairment or annulment does not extend to vested rights in property or contract acquired by user of corporate powers and franchises. Thus where by a railroad charter the general power is given to

¹ *Missouri Pacific Ry. Co. v. Nebraska*, 217 U. S. 196, 54 L. Ed. 727 (1910), reversing 81 Neb. p. 51.

² *Atchison, etc., R. Co. v. Denver, etc., R. Co.*, 110 U. S. 667 (1884), 28 L. Ed. 291; *Wisconsin*,

etc., R. Co. v. Jacobson, 179 U. S. 287 (1900), 45 L. Ed. 194.

³ *Minneapolis & St. Louis R. Co. v. Minnesota*, 186 U. S. 257 (1902), 46 L. Ed. 1151.

⁴ *Louisville & Nashville R. Co. v. Kentucky*, 161 U. S. 677 (1896), 40 L. Ed. 849.

consolidate with, purchase, lease or acquire the stock of other roads, which had remained unexecuted, the legislature may declare by subsequent acts that this power shall not extend to the purchase, lease or consolidation with parallel or competing lines.¹

Where a railroad corporation is organized under state law by the purchasers of the property of a railroad corporation at foreclosure sale, there is no contract right created protected by the federal constitution against the enforcement of subsequent statutory regulations respecting railroad rates existing when the new company was incorporated, though not in force when the mortgage was executed, and the railroad company, by incorporating under a general law of the state, is estopped to contest the validity under the federal constitution of the provisions of an act regulating railroad rates, which form one of the burdens imposed by the state as a condition of becoming an incorporated body.²

It is the proper duty of a railroad company to establish stations at proper places on its lines, and it is therefore within the power of a state to make it the *prima facie* duty of the company to establish stations at all villages and boroughs on their respective lines. A state statute requiring such erection of stations by railroad companies on the order of the state railway and warehouse commission, the burden being imposed upon the company of meeting the presumption that the order of the commission is correct, does not amount to an invasion of the rights of private property and is not repugnant to the constitution of the United States.³

The subject of the state power of railroad regulation where affecting interstate commerce has been considered in chapter 2 in connection with the concurrent and exclusive powers. In such cases the power of the state is sustained as a lawful regulation of interstate commerce in the absence of legislation by congress. In the class of cases now under consideration the state legislation is assailed, not on the ground of interference with

¹ *Piersall v. Great Northern R. Co.*, 161 U. S. 646 (1896), 40 L. Ed. 838. of New York v. Cook, 148 U. S. 897, 37 L. Ed. 498 (1892).

² *Grand Rapids & Indiana R. Co. v. Osborne*, 193 U. S. 17, 48 L. Ed. 598 (1904). See also *People of Minneapolis, etc., R. Co. v. Minnesota*, 193 U. S. 53 (1904), 48 L. Ed. 614.

interstate commerce, but as an impairment of the property rights of the railroad violative of due process of law and the equal protection of the laws as secured by the constitution of the United States.

State regulations have been sustained requiring railroads to adjust and pay claims on intrastate shipments within forty days after the filing of the claim under the penalty of \$50.00 for each failure, where there could be no award of penalty unless there was a recovery for the full amount of the claim.¹ The order of a state commission, requiring a railroad to restore a connection at a given point with the train of another road, was within the power of the state, if other connections were inadequate for public convenience, although compliance with the order might necessitate the running of an extra train or the extent of the run of the local train, as long as the income of the railroad from its business in the state afforded adequate remuneration.²

A railroad company in Kansas was compelled by peremptory mandamus by the supreme court of the state to operate a passenger train between a given point and the state line; and this was held within the lawful power of the state.³ The state also has the right to insist upon equality between all its citizens and to require a rate for all where the railroad, under the guise of a rebilling rate, gives anyone such rate,⁴ and may require a railway to operate a particular line, although compliance may entail expense and require the exercise of eminent domain, and may require a railway company to broaden and standardize a narrow guage railroad throughout its length.⁵

A state may also lawfully legislate for the safety of those engaged in railroad business within its limits, and may enact

¹ *Seaboard Air Line v. Seeders*, 207 U. S. 73, 52 L. Ed. 108, affirming 73 N. C. 71 (1907).

² *Atlantic Coast Line R. R. v. Corporation Commission*, 206 U. S. 1, 51 L. Ed. 933 (1906), affirming 137 N. C. 18, citing *Wisconsin R. Co. v. Jacobson*, *supra*.

³ *Missouri Pacific R. R. v. Kansas*, 216 U. S. p. 262, 54 L. Ed. 472 (1910). In *D. & W. R. Co. v. Stevens*, 172 Fed. 595, N. D. of N. Y. (1909), it was held that the State

Public Service Commission of New York could compel an interstate railroad to put on additional trains when required for local purposes.

⁴ *Alabama & Vicksburg R. R. Co. v. Commission of Mississippi*, 203 U. S. 496, 51 L. Ed. 289 (1906).

⁵ *Mobile J. & K. C. R. R. Co. v. Mississippi*, 210 U. S. 187, 52 L. Ed. 1016 (1908), affirming 88 Miss. 172 and 89 Miss. 724.

reasonable regulations to that end which will be valid as to all within its jurisdiction in the absence of legislation by congress.¹

§ 130 (102). The state Anti-Trust Laws and the fourteenth amendment.—The power of the state in the enactment of so-called anti-trust legislation, prohibiting contracts and combinations in restraint of trade, had been discussed by the federal courts in connection with the regulation and control of railroads and other public service corporations; and it has been held that such statutes are within the constitutional power of the state when not violative of the federal guarantees of the due process of law and the equal protection of the laws or other constitutional guarantees.

The extent of the state power in the enactment of such statutes is illustrated in the decision of the supreme court,² holding that a statute of Wisconsin which punished combining for the purpose of wilfully or maliciously injuring another in his business, and construed by the supreme court of the state as requiring malicious, as distinguished from mere wilful injury, was not violative of the lawful right to contract protected by the fourteenth amendment. The court said that malicious mischief was a proper subject for legislative repression, and still more were combinations for the purpose of inflicting it, and that it would be impossible to hold that the liberty to combine to inflict such mischief, even upon such intangibles as business or reputation, was among the rights which the fourteenth amendment was intended to preserve.³ The court did not decide what would be the force of the constitutional objection if the statute was construed to embrace combining to effect wilful, as distinguished

¹ Chicago, R. I. & P. v. Arkansas, 219 U. S. 458, 55 L. Ed. 275, affirming 86 Ark. 412 (1910), sustaining a statute prescribing a minimum of three brakemen for freight trains of more than twenty-five cars, regardless of any equipment with automatic couplers and air brakes.

² *Alkins v. Wisconsin*, 195 U. S. 194, 49 L. Ed. 154 (1904); *Smiley v. Kansas*, 196 U. S. 447, 49 L. Ed. 546 (1905).

³ The conviction affirmed in this case was that of certain newspaper managers who, it was alleged, had combined to maliciously injure a rival paper by agreeing to refuse space to advertisers who should pay the increased rates fixed by such rival, except at a corresponding increase, but to permit those to advertise in their papers at the old rate who should refuse to pay their rival the new rate.

from malicious, injury. The Texas Anti-Trust Law had been adjudged defective on account of discriminatory features¹ and it was held by the supreme court,² in affirming the judgment of the Texas court, forfeiting the license of a foreign corporation to do business in the state because of its violation of the anti-trust laws in entering into an agreement to fix the price of cotton seeds, that it was bound by the construction of the Texas statutes, made by the Texas courts, which held that the discriminatory features of the act had been repealed.

Such a law is invalid when it attempts to exempt a certain class of the community, such exemption being on no reasonable basis of classification. Thus, the Anti-Trust Law of Illinois was held invalid on the ground that agricultural products or live stock in the hands of the producer or raiser are exempted from the operation of the statute, which prohibited the recovery of the price of the article sold by any trust or combination if in restraint of trade or commerce in violation of the act. The supreme court said that this discrimination was a denial of the equal protection of the laws.³ The court said that such a statute was not a legitimate exertion of the power of taxation, rested upon no reasonable basis, was plainly arbitrary and clearly denied the equal protection of the laws to those against whom it discriminated; as this exemption was such a material feature of the law, that presumably it would not have been enacted without it, the whole law was held void.

The Tennessee Anti-Trust Act, which provided that corporate violators should be proceeded against by bill in equity on relation of the attorney general, while any persons offending its provisions could not be tried without a grand jury investigation and indictment or presentment and a trial by jury with the requirement of establishing guilt beyond a reasonable doubt and to the benefit of the statute of limitations of one year, did not deny the equal protection of the laws. The supreme court said that the fourteenth amendment did not introduce a factitious equality without regard to practical difference, that are best met

¹ In re Grice (No. Dist. of Texas), 79 Fed. 627 (1897).

² Connolly v. Union Sewer Pipe Co., 184 U. S. 540 (1902), 46 L. Ed. 679.

³ National Oil Co. v. Texas, 197 U. S. 115, 49 L. Ed. 689 (1905), affirming 72 S. W. 615.

by corresponding differences of treatment. The use of fine and imprisonment was likely to be efficient for men, while the latter was impossible, and the former less serious to corporations.¹

The Arkansas Anti-Trust Act of 1905 was also held valid as to foreign corporations, and the possible invalidity of the act as to individuals did not make the provisions invalid as to corporations, and no contract rights of domestic corporations were impaired by the imposition of a penalty on corporations doing business in the state while members of a trust or combination to control prices, where the legislature was empowered to repeal, alter or amend corporate charters, provided no injustice was done to the incorporators. Neither was due process of law denied by an order under this statute directing the production of books and papers by a foreign corporation, nor by striking from the files an answer of a foreign corporation on a refusal to produce such books and papers, nor did such order amount to an unreasonable search or seizure.²

§ 131 (103). Classification in state railroad legislation.—Where classification is reasonable, that is, based upon legitimate considerations of public policy, it is valid, as legislation must necessarily be specialized in its adaption to the subjects of legislation. The question is thus left open for determination in every case of classification for legislation, whether the discrimination is natural and reasonable or arbitrary and oppressive, and therefore a denial of the equal protection of the laws guaranteed by the fourteenth amendment.³

The difficulty of determining these questions of classification was illustrated in the division of the supreme court in two recent cases. In one⁴ the court held invalid a statute of Texas

¹ *Standard Oil Co. of Ky. v. Tenn.*, 217 U. S. 413, 54 L. Ed. 817 (1910).

² *Hammond Packing Co. v. Ark.*, 212 U. S. 322, 53 L. Ed. 530 (1909), affirming 81 Ark. 519.

³ In *Niagara Falls Fire Ins. Co. v. Cornell*, 110 Fed. 816 (1901), the circuit court of Nebraska held the anti-trust law of that state void on account of its exemption of assemblies and as-

sociations of working men and reserving to them all their rights and privileges now accorded to them by law. This case also held that foreign insurance companies doing business in the state by permission were entitled to invoke the protection of the federal law and challenge the validity of statutes which affected their business equally with state companies.

⁴ *Railroad Co. v. Ellis*, 165 U.

which required railroad companies in all cases of claims under \$50.00 to pay an attorney's fee not exceeding \$10.00 to the party successfully suing, provided the suit was brought thirty days after the refusal of the company to pay the claim. The court said that this was an arbitrary selection which could not be justified by calling it classification. In the other case¹ a Kansas statute providing that in all actions brought for damages caused by fire from the operation of the railroad the court should allow the plaintiff on recovery a reasonable attorney's fee, which should become a part of the judgment, was sustained, the opinion of the court being rendered by the same judge, Justice Brewer, in both cases. It was said in the latter case that while the principles of separation between the classes were not difficult, yet their application often became very troublesome, especially when the case was near the dividing line. "It is easy to distinguish," said the court, "between the full light of day and the darkness of midnight, but often very difficult to determine whether the given moment in the twilight hour is before or after that in which the light predominates over the darkness."

The statute of Kansas regulating charges in public stockyards, and applying only to one corporation and not to other companies or corporations engaged in like business, was held to deny the equal protection of the laws.²

A law of Texas directed solely against railroad companies and imposing a penalty for permitting Johnson grass or Russian thistle upon their roadway was sustained,³ the court saying: "Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that the legislatures are the ultimate guardians of the liberties of the people in quite as great a degree as the courts."

A law of Iowa excepting "sales by jobbers and wholesalers in doing an interstate business with customers outside of the state"

S. 150, 41 L. Ed. 667 (1897), three judges dissenting.

¹ A. T. & S. R. R. Co. v. Matthews, 174 U. S. 96, 43 L. Ed. 909 (1899), four judges dissenting.

² Cotting v. Kansas City Stockyards Co., 183 U. S. 79, 46 L. Ed. 92 (1901).

³ Missouri, Kansas & Texas R. Co. v. May, 194 U. S. 267 (1904), 48 L. Ed. 971, two judges dissenting. See decisions of supreme court of United States on Wisconsin Anti-Trust Law, November 4, 1904, 195 U. S. 194, 49 L. Ed. 154.

from a license tax imposed upon dealers in cigarettes was sustained,¹ the court saying that there was a clear distinction in occupations warranting the classification.

The modification of the fellow-servant rule as to railway employees by a state statute does not violate the equal protection of the law; and a general classification of railroad employees as subject to such statute is a proper exercise of the police power of the state. Neither does a statute prohibiting drumming and soliciting of business upon railroad trains and premises violate the equal protection of the laws, though it singles out certain business and professions for which soliciting of patronage is prohibited.²

¹ *Cook v. County of Marshall*, 196 U. S. 261, 49 L. Ed. 471 (1905).

² *Williams v. Arkansas*, 217 U. S. 79, 54 L. Ed. 673 (1910). See also *Chicago, R. I. & Pac. Ry. Co. v. Arkansas*, *supra*, where the ex-

clusion of railroads less than fifty miles in length from a statute prescribing the minimum of brakemen for certain freight trains, did not deny the equal protection of the laws, affirming 86 Ark. 412.

PART II.

INTERSTATE COMMERCE ACT.

SECTION 1.

- § 132. Section 1 of the Act of 1887.**
- 133. Section 1 as amended by Act of June 18, 1910.**
- 134. Amendments to the section.**
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183. Rates as affected by development of country.
184. Commission on the interdependence of rates.
185. The commerce court on interdependence of rates.
186. Reasonableness of rates as dependent on character of traffic.
187. Distance as a factor in rates.
188. The commission on comparison of rates.
189. Reasonableness of rates as relating to cost of service and needs of the shipper.
190. Reasonableness and proportion.
191. The commission on rate wars and reasonableness of rates.

§ 132 (104). Section 1 of the Act of 1887:—*Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled,* That the provisions of this act

[Carriers and transportation subject to the act.]

shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management, or arrangement, for a continuous carriage or shipment, from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country; *Provided, however,* That the provision

[Act does not apply to transportation wholly within one State.]

of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State, and not shipped to or from a foreign country from or to any State or Territory as aforesaid.

[What the terms "railroad" and "transportation" include.]

The term "railroad" as used in this act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term "transportation" shall include all instrumentalities of shipment or carriage.

[Charges must be reasonable and just.]

All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage, or handling of such property, shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful.

§ 133. Section 1 as amended and in force (1911).—SECTION 1. *(As amended June 29, 1906, April 13, 1903, and June 18, 1910.)* That the provisions of this Act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, *and to*

[Carriers, telegraph, telephone, and cable companies, and transportation subject to the act.]

telegraph, telephone, and cable companies (whether wire or wireless) engaged in sending messages from one State, Territory, or District of the United States, or to any other State, Territory, or District of the United States, or to any foreign country, who shall be considered and held to be common carriers within the meaning and purpose of this Act, and to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment), from one State or Territory of the United States or the District of Columbia, to any other State or Territory of the United States or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the

United States and carried to such place from a port of entry either in the United States or an adjacent foreign country: *Pro-*

[Act does not apply to transportation or to transmission of messages wholly within one state.]

vided, however, That the provisions of this Act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid, nor shall they apply to the transmission of messages by telephone, telegraph, or cable wholly within one State and not transmitted to or from a foreign country from or to any State or Territory as aforesaid.

[Express companies and sleeping car companies included.]

[What the term "railroad" includes.]

The term "common carrier" as used in this Act shall include express companies and sleeping car companies. The term "railroad" as used in this Act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transporta-

[What the term "transportation" includes.]

tion or delivery of any of said property; and the term "transportation" shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported; and it shall

[Duty of carrier.]

be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto, *and to provide reasonable facilities for operating such through routes and to make reasonable rules and regulations with respect to the exchange, interchange, and return of cars used therein, and for the operation of such through routes, and providing for reasonable compensation to those entitled thereto.*

[Charges must be just and reasonable.]

All charges made for any service rendered or to be rendered in the transportation of passengers or property *and for the transmission of messages by telegraph, telephone, or cable*, as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or

any part thereof is prohibited and declared to be unlawful: *Provided, That messages by telegraph, telephone, or cable, subject to the provisions of this Act, may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages:*

[Exchange of services.]

And provided further, That nothing in this Act shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts with common carriers, for the exchange of services.

[Further duty of carrier.]

And it is hereby made the duty of all common carriers subject to the provisions of this Act to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this Act which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this Act upon just and reasonable terms, and every such unjust and unreasonable classification, regulation, and practice with reference to commerce between the States and with foreign countries is prohibited and declared to be unlawful.

[Free passes and free transportation prohibited.]

No common carrier subject to the provisions of this Act shall, after January first, nineteen hundred and seven, directly or indirectly, issue or give any interstate free ticket, free pass, or free

[Excepted classes.]

transportation for passengers, except to its employees and their families, its officers, agents, surgeons, physicians, and attorneys at law; to ministers of religion, traveling secretaries of railroad Young Men's Christian Associations, inmates of hospitals and charitable and eleemosynary institutions, and persons exclusively engaged in charitable and eleemosynary work; to indigent, destitute, and homeless persons, and to such persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation; to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Homes, including those about to enter and those returning home after discharge; to necessary

care takers of live stock, poultry, milk, and fruit; to employees on sleeping cars, express cars, and to linemen of telegraph and telephone companies; to Railway Mail Service employees, post-office inspectors, customs inspectors, and immigration inspectors; to newsboys on trains, baggage agents, witnesses attending any legal investigation in which the common carrier is interested, persons injured in wrecks and physicians and nurses attending

[Interchange of authorized passes and franks.]

such persons: *Provided*, That this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers, and their families; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation: *And provided further*, That this provision shall not be construed to prohibit the privilege of passes or franks, or the exchange thereof with each other, for the officers, agents, employees, and their families of such telegraph, telephone and cable lines, and the officers, agents, employees and their families of other common carriers subject to the provisions of this Act: *Provided further*, That the

[Amendment of April 12, 1908, and June 18, 1910.]

[Extension of meaning of term "employees" and "families."]

term "employees" as used in this paragraph shall include furloughed, pensioned, and superannuated employees, persons who have become disabled or infirm in the service of any such common carrier, and the remains of a person killed in the employment of a carrier, and ex-employees traveling for the purpose of entering the service of any such common carrier; and the term "families" as used in this paragraph shall include the families of those persons named in this proviso, also the families of persons killed, *and the widows during widowhood and minor children during minority of persons who died*, while in the service of any such common carrier. Any common carrier violat-

[Jurisdiction and penalty for violation.]

ing this provision shall be deemed guilty of a misdemeanor, and for each offense, on conviction, shall pay to the United States a penalty of not less than one hundred dollars nor more than two thousand dollars, and any person, other than the persons excepted in the provision, who uses any such interstate free ticket, free pass, or free transportation shall be subject to a like penalty. Jurisdiction of offenses under this provision shall be the same as that provided for offenses in an Act entitled "An Act to further regulate commerce with foreign nations and among the States," approved February nineteenth, nineteen hundred and three, and any amendment thereof.

From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from

[Railroad companies prohibited from transporting commodities in which they are interested. Timber and products thereof excepted.]

any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier.

Any common carrier subject to the provisions of this Act, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall con-

[Switch connections.]

struct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be construed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such

[Switch connections may be ordered by the commission.]

shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid on application therefor in writing by any shipper or owner of *such lateral, branch line of railroad*, such shipper or owner of *such lateral, branch line of railroad* may make complaint to the Commission, as provided in section thirteen of this Act, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the Commission may make an order, as provided in section fifteen of this Act, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the Commission, other than orders for the payment of money.

§ 134. Amendments to the section.—For convenience of reference section 1 is given above as it appeared in the original act of 1887 and as amended June 18, 1910. No change was made in this section, as first enacted, until the passage of the Hepburn act in 1906, the text of which can be followed substantially by reading the roman type of the print of the act of 1910 as above given. The amendment of [1908 with respect to passes is noted in the margin and the additions of 1910 are printed in *italics*.

It will be seen that the scope of the act was greatly enlarged in 1906 and further materially extended in 1910. From 1887 to 1906 the purview of the act was limited to commerce between the states in which rail carriers participated in the through transportation. By the Hepburn act of 1906 oil pipe-lines, express companies and sleeping car companies were brought within its scope; the terms "railroad" and "transportation" were more elaborately defined; the obligation to establish through routes imposed; a specific prohibition of free passes was declared, provision being made for certain exceptions therefrom; the "commodities clause" inserted; and, under certain conditions, switch-connections made imperative. The act of 1910, commonly called the Mann-Elkins act, added telegraph, telephone and cable companies to those subject to this regulation, making the necessary changes in the succeeding portions of the section. There is a striking addition also in the inclusion, among matters subject to the jurisdiction of the commission, of classifications, regulations and practices of the carriers with respect to various forms of transportation and of the evidences of contracts having relation thereto.

§ 135 (105). All of interstate commerce not included.—As defined in this section all carriers engaged in interstate commerce are not subject to the act; nor is all "transportation," or "transmission," between the states included. Clearly the intention of the act is to regulate all carriers engaged in the transportation of passengers or property by railroad, or by rail and water when said rail and water transportation is under a common control, management, or arrangement for a continuous carriage. The amendment of 1906 subjects pipe lines transporting "oil or other commodity" to regulation; but the inclusion of "express companies and sleeping car companies" in the term common carrier and the further elaboration of the definition of the term "transportation" merely show the determination of congress to embrace all transportation by rail between the states. This section as it now stands, shows the growing purpose of the act to be federal regulation of all means of interstate commerce that by nature are subject to monopoly or combination.

Interstate transportation wholly by water is not included nor is that moving by team or wagon. 7 I. C. C. Rep. 286. Congress had repeatedly legislated with respect to water transportation,

but in this enactment its attention was directed mainly to the abuses in railroad transportation. The pooling of traffic by water carriers is a matter over which the commission has no jurisdiction (13 I. C. C. Rep. 266); and an ocean carrier established under the laws of Cuba and transporting traffic between Havana and Galveston, is not subject to the act. 13 I. C. C. Rep. 310. Carriers of interstate commerce by water are subject to the act to regulate commerce only in respect to traffic transported under a common control, management or arrangement with the rail carrier for a continuous carriage or shipment; and in respect to traffic not so transported they are exempt from its provisions. 15 I. C. C. Rep. 205 and 21 I. C. C. Rep. 207.

This limitation of the scope of the act extends to the power of the commission in requiring reports. See *infra*, secs. 15 and 20 of act. It was held by the commerce court (Oct. 5, 1911) ——— Fed. ———, in the cases of the Goodrich Transit Company and other companies operating steamers in the Great Lakes from Chicago, that the commission had authority to require reports with respect to their interstate business in connection with railroads, but that it had no authority to call for reports of their transactions relating exclusively to "port-to-port" interstate business or to intrastate traffic or affairs.

A steamboat on a navigable river can only demand of a railroad connecting with river points that it receive and deliver freight at the published locate rates, as an independent water line is not included in the act. 4 I. C. C. Rep. 265, 3 I. C. Rep. 278. A carrier by water, which has not joined in a traffic and division sheet filed and published by connecting railroad carriers between two points, does not become a party to a common arrangement for the carriage of such a shipment. *Mutual Transit v. U. S.*, C. C. A. second circuit, 1910, 178 Fed. 664. Under the amendment of 1906 the commission is empowered to establish a through rate when one of the connecting carriers is a water line. See section 15, *infra*.

The decisions of the courts on this question have been in accord with the rulings of the commission. A railroad lying wholly within the state which transports freight, whether coming from within or without the state, solely on local bills of lading on a special contract limited to its own lines, and without dividing charges with any other carriers or assuming any obli-

gations to or for them, does not come within the provisions of the act, and is not bound to make any reports of its business to the commission. *United States v. Railroad Co.*, 81 Fed. 788 (1897), following, *C. N. O. & T. P. R. Co. v. Commission*, 162 U. S. 184, 40 L. Ed. 935 (1896), and *Commission v. B. Z. & C. R. Co.*, 77 Fed. 942 (1897). See also *U. S. v. Geddes* (6th Cir. C. C. A.) 131 Fed. 452 (1904), where the same ruling was made as to railroads subject to the Safety Act.

§ 136 (106). Parties subject to the act.—Before the amendments of 1906, enlarging the scope of the act, it had been held that the jurisdiction of the commission only extended to the common carriers described in the section. Section 2 of the act of February 19, 1903, *infra*, § 422, specifically provided that in any proceeding instituted before the commission or in the courts it should be lawful to include as parties in addition to the carrier all who are interested in or affected by the rule, regulation, or practice under consideration. This is the warrant for the occasional inclusion among parties defendant in proceedings before the commission of natural persons acting as agents of the various carriers in the publication of rates.

The application of the provisions of the act to pipe lines was made by the amendment of 1906. Owners of pipe lines had been held to be common carriers when doing business for the public as such. *Griffin v. Pipe Lines*, 172 Pa. 580. As the act now stands some of its provisions are made specifically applicable to railroads and others are clearly intended for railroads only. As to the owners of pipe lines who are not common carriers, and who use their pipe lines solely for the transportation of their own products, it would seem that they are not included in the act. Shipments from one place to another in the same territory were first included by the amendment of 1906. This extension of the scope of the act follows the precedent made in the Anti-Trust Act, *infra*, § 464.

§ 137. Common carriers under the act.—This act limits its application with respect to transportation by rail of persons and property to carriers by rail or partly by rail and partly by water, which are “common carriers.” The act does not define what will necessarily constitute a person or a corporation a common carrier, nor does it empower the commission to lay down

the tests. It follows that the expression "common carriers" used by congress means those carriers which are common carriers at common law, and which have complied with such requirements, as may have been imposed by constitutional or legislative authority.

This principle was declared and applied by the commission in the case of *Manufacturers Railway of St. Louis*, 21 I. C. C. R. 304. It was claimed that this company was not in fact a common carrier but a plant facility of a brewing association which latter owned the stock, and a very large proportion of the business of the railway company was that of the brewing association, and the traffic of the latter constituted one-thirtieth of the total traffic of the city of St. Louis. The case was presented on the application of the company that through routes be established to and from points on its lines in St. Louis and from and to points on its lines of each of the defendants railway company and points beyond, also for the fixing of reasonable divisions or absorptions out of the St. Louis rates to be paid to the manufacturer's railway for terminal services rendered by it. The company operated about twenty miles of track of which two and one-half miles were claimed as main track and the remainder as side tracks, switches and yard tracks. Of the total twenty miles six miles were lines from the brewing association, and used in part both for the services of the brewery and the public. It owned and operated four locomotives, and no passenger business or less than car load business originated on its lines. Out of the total of some 42,000 cars handled in the yard some 5,000 were handled by other industries or patrons and all of the remainder for the brewery association. It claimed, and the commission found that it was performing a business of a common carrier for the public, and the commission said that it was not within its authority to pronounce any carrier by rail not to be in fact or in law a common carrier, if it would have been held as such at common law. It was therefore ruled that the company was within the provision of the first section of the act, and that the payment to it of a reasonable and just proportion of the St. Louis rate for terminal services was not unlawful.

While the company was doing business as a common carrier it was also a plant facility. There was nothing in the act however or in any of its amendments, which affected the right of

ownership of a railroad by a shipper or shippers over the line. That fact, however, did have a bearing on the determination of the amount of allowance of services under the principles declared by the commission in the investigation of "tap lines" and industrial lines (see *infra*, § 212) and the duty and responsibility, therefore, involved upon the carriers to guard closely these features so as not to make themselves liable under the statute for unjust discrimination or undue preference or advantages.

§ 138 (107). **Express companies under the act.**—Express companies were not included in the act prior to the amendment of 1906. *U. S. v. Moreman*, 42 Fed. 488 (1890); *Southern Indiana Express Co.*, 31 C. C. A. 172, 92 Fed. 1022 (1899) affirming 88 Fed. 659.

Before the passage of the Interstate Commerce Act of 1886, the supreme court in the *Express Company Cases*, 117 U. S. 1, 29 L. Ed. 791 (1886), had decided that railroad companies were not required by usage or the common law to transport express traffic for the independent companies over their lines, and that they were not obliged to do more as express carriers than to provide the public at large with reasonable accommodations, and in the absence of a statute they were not obliged to furnish equal facilities to all express companies.

The commission has considered, in several cases, the regulation of express companies under the act. Thus, it is ruled that while express companies must serve their patrons under similar conditions without discrimination (12 I. C. C. R. 196, and 15 I. C. C. R. 15); it is also held (13 I. C. C. R. 475), that the main object of an express service is expedition; and express rates should not be so low as to attract business which might properly go by freight, and thereby congest and interfere with the service by express, and that the fact that express rates in and out of a particular business locality are higher than those in and out of a competing locality from a common source of supply is not of the same importance as in the case of freight rates, since the wholesaler ordinarily brings his merchandise in by freight and distributes it by freight; and that a comparison of express rates in one locality with those in another is of much greater value than a similar comparison between freight rates since the character of the business and the conditions under which it is trans-

acted are more nearly the same. As to the conditions under which Pacific rates were found unreasonable, see 16 I. C. C. R. 32.

It is also ruled that the rates made by express companies upon small packages in competition with the United States mail are not to be taken as standards by which to determine the reasonableness of their rates upon larger packages. 13 I. C. C. R. 475, 16 I. C. C. R. 32. The relation of the express companies to the railroads in the matter of free transportation to their men and material, was discussed in 16 I. C. C. R. 246, and it was decided in *American Express Company v. U. S.*, 212 U. S. 522, 53 L. Ed. 635 (1908), affirming 161 Fed. 606, that the express companies are prohibited from giving free transportation of personal baggage to their officers and employes and members of their families, and to the officers of other transportation companies and members of their families in exchange for passes issued by the latter to the officers of the express companies, by the Elkins Act of 1903 and by the Hepburn Act of 1906, which forbid all transportation of property at less than the published rates; and that the proviso to the Hepburn Act relates solely to the carriage of passengers and does not embrace free transportation by express companies, although by the terms of the act express companies are deemed common carriers.

In cases concerning express companies the commission has applied the same rule which is enforced in the case of other carriers. Thus, it was ruled in 15 I. C. C. R. 53, that it had no jurisdiction over claims for damages for delay in express shipments, as the obligation to deliver promptly and safely was enforced by common law and not by the Interstate Commerce Act. In 17 I. C. C. R. 115, certain express rates from New York city to Boise City, Idaho, were held unreasonable; and it was ruled that express companies as other carriers could not lawfully make a difference in rate based upon the time of the payment of the charges, and that it was a general principle that a through rate should not exceed the lowest combination of locals between the same points. 16 I. C. C. Rep. 394.

§ 139. *Sleeping car companies.*—These companies were included in the act with express companies in the amendment of 1906. It was ruled, in 16 I. C. C. Rep. 410, that the Pullman company operating sleeping cars at the joint expense of itself and

the railroad company interested was a common carrier, subject to the jurisdiction of the commission; that it was required to publish its rates and the regulations governing the application of such rates; and that these, when published, were subject to the consideration and correction of the commission. In this case the passenger offered a local ticket to an intermediate point and a mileage book beyond for transportation to his destination; thereupon the Pullman agent refused to sell sleeping-car accommodations on the ground that the tariff prohibited selling such accommodations except upon a through ticket, the price of which in this case was greater than the combination of the locals. The commission ruled that the Pullman company was within its rights and declined relief, but at the same time condemned such conditions, saying it was the almost invariable rule of the commission that the through rate should not exceed the combination of the locals.

In 18 I. C. C. Rep. 135, March, 1910, the commission considered the reasonableness of the rates for sleeping cars and reduced the price of the upper berth from St. Paul to Chicago to \$1.50 as compared with \$2.00 for the lower berth; while the lower berth from St. Paul to Seattle was reduced from \$12.00 to \$10.00; the upper to \$8.50. Two of the commissioners dissented on the ground that existing passenger rates were in favor of the occupant of the sleeping car, and that the existing discrimination was really against the day-coach passenger who did not enjoy the sleeping-car privileges. This order of the commission was modified, 20 I. C. C. Rep. 21, upon the Pullman company offering a general reduction in the rates for upper berths of about twenty per cent as compared with the rates for lower berths and a reduction also in the rates on long hauls, these reductions to apply all over the country.

§ 140 (108). Under common control, management or arrangement for a continuous carriage.—The rulings of the commission as to what constitutes a common control, management or arrangement for a continuous carriage have been affirmed by the courts. The test of subjection to the act is through routing in interstate commerce. When a carrier unites with one or others in making a rate for interstate traffic and a through bill is issued therefor, it is subject to the act. In *C., N. O. & T. P. R. Co. v. Commission*, 162 U. S. 184, 40 L. Ed. 935 (1896), the supreme

court held that a railroad company whose road was wholly within the bounds of a single state which had voluntarily engaged as a common carrier in interstate commerce, by making an arrangement for the continuous carriage of goods through another state, was subject as to such traffic to the provisions of the act. An express agreement for a through rate is not required, but the successive receipt and forwarding in the ordinary course of business by two or more carriers in interstate traffic under through bills, or any arrangement for a continuous carriage over their lines, constitutes assent to such common arrangement for the carriage within the meaning of the act.

When there is a through bill of lading for a continuous carriage, it is immaterial that one of the roads party to the through bill received the sole benefit of the rate on its own line. Such a case was presented to the supreme court in *L. & N. R. Co. v. Behlmer*, 175 U. S. 648, 44 L. Ed. 309 (1900), where the court said that the contention under this state of facts that the carriers did not constitute a continuous line bringing them within the control of the act to regulate commerce was no longer open to controversy in that court. See also *United States v. Seaboard Railway Co.*, 82 Fed. 563 (1897).

A local switching company is not subject to the act where it makes no contracts of through shipment, but imposes a separate trackage charge upon the other companies for the use of its tracks in local transportation. But where such a company does become a party to such a contract for through shipment, it becomes as to such business subject to the act. See *C., M. & St. P. R. Co. v. Becker*, 32 Fed. 849 (1897). As to the evidencing of contracts for through shipments, see the ruling of the commission in 2 I. C. C. R. 553, and 2 Int. Com. Rep. 393.

A railroad lying wholly within a state which transports freight, whether coming from within or without the state, solely on local bills of lading on a special contract limited with its own lines, and without dividing charges with any other carrier or assuming any obligations to or for them, does not come within the provisions of the act and is not bound to make any report of its business to the commission. *U. S. v. Railroad Co.*, 81 Fed. 783, (1897), following 162 U. S. 184, *supra*, and *Commission v. B. Z. & C. R.*, 77 Fed. 942. See also *U. S. v. Geddes*, sixth circuit, C. C. A., *supra*. Through routing by arrangement for con-

tinuous interstate traffic, is a matter of contract between the carriers, subject to the power of the commission to compel a through routing under the act as amended in 1906. See *infra*, § 372.

It is the through bill of lading that marks the continuous interstate carriage; neither the intention of the shipper nor the actual movement of the goods has any bearing upon the matter. 162 U. S. 184, 40 L. Ed. 935 (1896); 204 U. S. 403, 51 L. Ed. 540 (1907); 21 I. C. C. R. 207.

§ 141 (109). **Transportation through a state.**—Commerce between points in the same state, which is carried through another state, is interstate commerce and subject to the act. This was definitely determined by the supreme court in *Hanley v. Kansas City Southern Railway Co.*, 187 U. S. 617, 47 L. Ed. 333 (1903), where the court affirmed the judgment of the circuit court of Arkansas enjoining the railroad commissioners of Arkansas from fixing and enforcing rates upon that part of the route within the state of Arkansas of a shipment beginning and ending in the state of Arkansas.

The court held that there could be but one rate fixed by one authority, and that the case was analogous to that of navigation on the high seas between ports of the same state. The court distinguished this case from that of a tax which was sustained in *Lehigh Valley Ry. Co. v. Pennsylvania*, 145 U. S. 192, 36 L. Ed. 672 (1892), which was in respect of the receipts of the proportion of the transportation within the state. A tax may be thus apportioned according to mileage, but when a rate is established, it must be established as a whole. This was the view that had been sustained by the commission in several cases, 7 I. C. C. R. 92, and overrules *United States v. Lehigh Valley R. Co.*, 115 Fed. Rep. 372, and several state decisions which had been based upon the decision of the supreme court in the *Lehigh Valley* case.

§ 142 (106). **Territorial transportation.**—The original act provided for the control of commerce between the states and territories. The power of congress within the territories, however, is general and plenary, combining the powers of state and federal governments under the express power to make all needful rules and regulations respecting the territory of the United States. Constitution, art. IV, sec. 3. See *Mormon Church v. U. S.*, 136 U. S. 1, 34 L. Ed. 481 (1890). See also decision of the su-

preme court holding the Employer's Liability Act of 1906 valid in the territories and the district of Columbia, though invalid in the states. 215 U. S. 87, 54 L. Ed. p. 106 (1909). The inclusion of transportation within a territory was effected by the amendment of 1906.

Thus the act, which was effective intra-territorially in Oklahoma from August 28, 1906, expired by its own force on November 16, 1907, when Oklahoma was admitted as a state. See 13 I. C. C. Rep. 366 and 473; 220 U. S. 302, 55 L. Ed. — (1911).

The commission by a majority report has ruled (19 I. C. C. Rep. 105) that it has no jurisdiction over the railroads of Alaska, and has declined to entertain a complaint for that reason. A writ of mandamus to compel the commission to take such jurisdiction was refused in the supreme court of the district of Columbia, which refusal was reversed upon appeal to the court of appeals, and the matter is now (1911), before the supreme court of the United States.

§ 143 (110). *Interstate electric railroads.*—As early as 1897 the commission, by a majority report, held that the terms of the act are broad and general and contain no exception excluding from its scope “those interstate roads which are constructed upon public highways, to provide the means for local passenger transportation in the streets of towns and cities and their various suburbs.” 7 I. C. C. R. 83. In 1907, the commission said that “the act makes no distinction between railroads that are operated by electricity and those that use steam;” “both are subject to the act when engaged in interstate transportation;” and “we may be measurably near its (electricity's) general use as the chief motive power in transportation.” 13 I. C. C. R. 20. In 1909, the commission ruled that an interurban road connecting Council Bluffs, Iowa, with Omaha, Neb., is a common carrier engaged in the interstate transportation of persons, and, therefore, amenable to the act. 17 I. C. C. R. 239.

This ruling was sustained by the commerce court (Oct. 5, 1911), ~~and~~ Fed. —, in an injunction brought by the railroad company to restrain the enforcement of the order. The court held that the commission had jurisdiction to make the order, overruling the decision of the circuit judges of the eighth circuit (179 Fed. 243, April, 1910) in granting a temporary injunction against the order, holding that the act did not apply to street

railroad companies. The commerce court in this case also held that the rate fixed by the commission, ten cents, was reasonable.

The commission has exercised its jurisdiction over electric street railways carrying interstate passengers in other cases. See 20 I. C. C. R. 232, 406, 486.

In section 15 of the Act of June 18, 1910, amending the Interstate Commerce Act, congress presumably with knowledge that the commission was exercising jurisdiction over electric street railways carrying interstate passengers enacted the following, in section 15, concerning through routing:

“The commission shall not, however, establish any through route, classification, or rate between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business and railroads of a different character.” (For construction of this proviso by the commission, see *infra*, § 374.)

This would seem to recognize the existence of the power of the commission over street electric railway passengers; otherwise there would have been no reason for inserting this exception in the statute.

§ 144 (111). Receivers, lessees and purchasers pendente lite. When railroad corporations are subject to the act, their receivers are also subject to its prohibitions, requirements and regulations. 6 I. C. C. R. 1; 6 I. C. C. R. 378; see also *Erb v. Morash*, 177 U. S. 584, 44 L. Ed. 897 (1900). Lessees of such corporations and purchasers at foreclosure sales are bound by the orders of the commission made pending such foreclosure. *Interstate Commerce Commission v. W., N. Y. & P. R. Co., W. D. of Pa.*, 82 Fed. Rep. 192 (1897).

It was ruled by the commission in 6 I. C. C. R. 378, that a railroad company subject to the act, could not by leasing its road, free itself from liability for practices made illegal by the act, nor after resuming possession of its property, pending proceedings against it to enforce such statutory provisions, claim exemption from liability during the time of the lease. See *Elkins Act*, *infra*, § 422.

§ 145 (112). Foreign commerce.—The act includes traffic “From any place in the United States to an adjacent foreign country, or from any place in the United States through a for-

eign country to any other place in the United States, and also to the transportation in like manner of *property* shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or * * * from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country."

The supreme court said in the Import Rate Case, 162 U. S. 197, 40 L. Ed. 940 (1896), after quoting this part of the section:

"It would be difficult to use language more unmistakably signifying that congress had in view the whole field of commerce (excepting commerce wholly within a state) as well that between the states and territories as that going to or coming from foreign countries."

The jurisdiction of the commission extends to only that part of the through import or export rate which applies to the inland proportion received by the carrier. As to effect of competition in import and export rates making dissimilar circumstances and conditions under sections 3 and 4, §§ 233, 295; *infra*. As to publications of import and export rates, see 8 I. C. C. R. 214; 10 I. C. C. R. 55.

The commission has ruled (13 I. C. C. Rep. 266) that it has no jurisdiction as to shipments moving from ports of the United States to a foreign country not adjacent, when such shipments are not carried by rail, or by rail and water, from an inland point of origin to a port of transshipment. An inland movement, by rail or by rail and water of exports or import traffic is a condition precedent to the jurisdiction.

It has recently (spring of 1911) been held by Judge McPherson, United States district court, at Philadelphia, that a carrier was not guilty of rebating under the Elkins Act, who transported sugar by rail within the United States at less than its published rates, the through bill of lading reading from Hamburg, Germany, "to Philadelphia for transportation in bond to Raymond, Alberta." Indeed a careful reading of the act to regulate commerce does not disclose any intention to regulate such transportation from one foreign country through the United States to another foreign country. Since this decision an amendment to the act has been introduced in congress to correct the oversight.

In 13 I. C. C. Rep. 310, the commission interpreted "adjacent

foreign country'' as meaning one between which and the United States there is the possibility of substantial continuity of rails.

§ 146 (113). Place of incorporation of the carrier immaterial. The commission has ruled that a foreign railroad corporation such as the Grand Trunk Railroad Company, carrying on its traffic between the United States and Canada, was subject as to its business in the United States to the same rules and conditions as domestic carriers. 3 I. C. C. Rep. 89, and 2 Int. Com. Rep. 497; 4 I. C. C. R. 447, and 3 Int. Com. Rep. 417. But while a corporation engaged in interstate traffic in the states is subject to the act as to such traffic, the jurisdiction of the commission is necessarily limited to the United States and does not extend to a question of alleged local discrimination in a foreign country as Canada. 10 I. C. C. R. 217.

The control of international transportation between Canada and the United States by a joint commission is now (1911) the subject of conference between these countries. A treaty is to be proposed and the necessary legislation passed in both countries.

§ 147 (114). The intention of interstate shipment not sufficient.—Transportation is not made interstate and subject to the jurisdiction of the commission by the intention of the shipper that when the shipment is delivered by the carrier in the same state it shall be further transported by another carrier into another state. 1 I. C. C. R. 30, and 1 Inter. 607. Thus, fruit delivered to a consignee at Jersey City under rates made to Jersey City on traffic originating in New Jersey, though destined for the state of New York, is not interstate traffic and the commission had no authority over such freight. 2 I. C. C. R. 142, and 2 Int. Com. Rep. 84.

In *Gulf C. & S. F. R. Co. v. Texas*, 204 U. S. 403, 51 L. Ed. 540 (1907), the court affirmed 97 Texas, 274, in holding that the regulations of the state railroad commission applied to a shipment from one Texas point to another, although the shipment originally was from a point in South Dakota. The intention of the owner to forward the shipment from its original terminal point to another point in the same state did not make the shipment between the two latter points by a connecting carrier an interstate shipment. This was not a case of reconsignment, but the original bill of lading was taken up and a new bill of lading issued from Texarkana, Tex., to Goldthwaite, Tex. The state law,

therefore, controlled. See also *C., N. O. & T. P. R. Co. v. I. C. C.*, 162 U. S. 184, 40 L. Ed. 935 (1896), and 21 I. C. C. R. 207.

§ 148 (115). All instrumentalities of shipment or carriage.—The term “railroad” as used in the original act expressly included “all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement or lease,” and the term “transportation,” the act declared, “shall include all instrumentalities of shipment or carriage.” It was held in the first important case arising under the act (*Kentucky & Indiana Bridge Co. v. L. & N. R. Co.*, 37 Fed. Rep. 567 (1889), circuit court, Justice Jackson, afterwards of the supreme bench), that this inclusion of bridges and ferries as subject to the act did not apply, where a bridge was not operated by the bridge company but by the railroad companies under contract with the bridge company. In such cases the court said the bridge company was not, either in law or fact, a common carrier within the scope and meaning of the section. The railroad company using the bridge, and not the bridge company was the common carrier.

It was ruled by the commission in 1 I. C. C. R. 495, and 1 Int. Com. Rep. 775, that a railroad company chartered by the state of Tennessee, owning a short road wholly in that state, neither operating its road nor owning any rolling stock, but used and operated as a means of conducting interstate traffic in coal by the companies owning a connecting interstate road, was one of the instrumentalities of interstate commerce and subject to the act. These definitions of what is included by the terms “railroad” and “transportation” have been extended by the amendments to 1906 and 1910, and a reference to the amended section as printed above will show what is meant.

§ 149 (116). Delivery, cartage, storage and demurrage charges.—Under the original act the inclusion in the requirement of reasonableness of charges for the services rendered in receiving, delivering, storing and handling property did not impose any additional duty upon the carrier in regard to the delivery or storage of property, and the carrier was not obliged under this section to deliver or store otherwise than as required by its common law duty as a carrier. These services, including any charges for demurrage and other terminal expenses, which have been included under the general term of accessorial serv-

ices, are now subject to the act, whenever rendered in connection with interstate traffic, as to the reasonableness of the charges under this section. It also follows that such services must be rendered without discrimination as between individuals in violation of section 2, and without undue preference as between localities or kinds of traffic under section 3.

It was said by the supreme court in the Grand Haven Cartage Case, *Commission v. Railroad Co.*, 167 U. S. 633, 1. c. 645, 42 L. Ed. 306 (1897), that while cartage was not in general a terminal expense and not in general assumed by the carrier, the transportation as a rule being ended when the freight was received at the warehouse, that it was a reasonable exercise of the commission's power to direct in a general order that the railroad companies should thereafter regard cartage as one of the terminal charges to be published in their schedules, as required under section 6 (As to ruling of the commission thereunder, see *infra*, sec. 6, and note, and 7 I. C. C. R. 1. c. 591).

The circuit court of appeals, in the same Grand Haven Cartage case, in their opinion, 21 C. C. A. 103, and 74 Fed. 803 (1896), which was approved by the supreme court, called attention to the distinction between the American and English customs of delivery of goods by carriers. Free cartage had been developed in the acts of the English railways from their competition with the carrier companies who used their lines, but that no such conditions had been developed in the growth of our American system of transportation, where it was very exceptional for railroads to do the carting required for delivering and collecting the goods. The service was essentially a distinct and separate service from rail carriage and purely accessorial.

The fact that a railroad company for many years had paid the charge for hauling freight from wharves to its station did not bind it to continue that practice, and, if not bound by contract, it might stop doing so at any time. 1 I. C. C. R. 107, 1. Int. Com. Rep. 363.

As to storage charges, it was ruled by the commission (10 I. C. C. R. 352), that a railroad freight depot and a public warehouse are not used for the same purposes, and a charge for storage in a railroad depot may properly be made higher than a public warehouse charge, with the object of compelling the expeditions removal of freight, without violation of this section.

The reasonableness of the regulations for demurrage and

other accessory services as well as the reasonableness of the charges, have been reviewed by the commission. In *Hite v. Central R. R. of N. J.*, C. C. A. 3rd Circuit, 171 Fed. 370 (1909), reversing the judgment in 166 Fed. 926, it was held that the circuit court had jurisdiction to determine the indebtedness of a shipper to a railroad company for demurrage under the rules adopted by the company where it depended on the construction and not on the reasonableness of the rules, although the latter question, that of reasonableness, was one primarily for the commission.

In *Michie v. N. Y., N. H. & R. Co.*, 151 Fed. 694, C. C. A. of Mass. (1907), a suit brought to recover the amount of a demurrage charge of \$1.00 per day for hay storage, the charge was held not unreasonable. It was ruled by the commission in 8 I. C. C. R. 531, that the making of demurrage charges to commence before the expiration of a reasonable time for loading or unloading was a violation of this section. As to charges of demurrage upon private cars, see *infra*, § 254.

§ 150. Commerce court on terminal facilities and plant facilities.—In the case of the *A. T. & S. F. R. Co. et al. v. The Commission*, the commerce court, 188 Fed. 229 (1911), denied a motion to dismiss under the provisions of section 1 of the act creating the court and made an order suspending the order of the Interstate Commerce Commission (18 I. C. C. R. 310), condemning the charge of two dollars and a half a car made by the railroads for delivering and receiving interstate carload freight in Los Angeles to a number of industries located upon spurs or side tracks within their respective switching limits. The order was not based upon the excessiveness of the charge for the service, but upon the theory that the carrier had already been paid for the service by the payment of the regular tariff rate from the point in Oregon to destination. The commission found that the industrial track upon which the service was rendered was a terminal facility of the railroad, and not a plant facility of the industry, and that the service for which the charge was made was the same service as that which was performed by the carrier in delivering freight at its depot or team tracks. The court held that such a finding of the commission was not one which precluded the court from coming to a different conclusion upon the record. That if there was a substantial conflict in the evidence, the court would feel bound by the finding of the commission,

unless clearly and palpably against the weight of the testimony. But that the court was not concluded by the finding of the commission based upon admitted facts which did not tend to sustain the conclusion reached. The court said that the contention that the transportation of cars and freight to and from industrial plants located from one-fifth of a mile to seven miles from the main track of the carrier was the same service which the carrier performed and for which it is paid by the general tariff charge when it delivers freight at its depot in Los Angeles, or at the team tracks, was so contrary to the admitted physical facts as to be wholly untenable. It seemed clear that in the absence of statute the railroads were not bound to perform this industrial track service, and if they voluntarily performed it under an arrangement with the owner of the industrial plant, there was no reason why they might not charge a reasonable price therefor, and the charge in question was conceded to be reasonable. It seems that the railroads filed with their general tariffs with the Interstate Commerce Commission a tariff for this industrial track service and there was no evidence that the railroads had ever waived the right to charge for this service. See *Interstate Commerce Commission v. Stickney*, 215 U. S. 105. The court therefore concluded that the carrier was not bound by law to deliver freight at the industrial plant and therefore it was a special service for which it was entitled to charge. There was no claim that the charge was unreasonable in itself, or that it involved any undue preference, or was discriminatory in any way. The order of the commission was therefore suspended.

§ 151. Bulk grain storage as part of transportation.—The “elevation, and transfer in transit,” of grain with such “storage” as may be incidental thereto is clearly a part of “transportation” both under the common law and as defined in this section. When performed by the carrier, or its agents, the charges must be just and reasonable. Such services, however, are not those which have received so much attention from the commission. The elevator cases considered by the commission have arisen by reason of the carriers’ contracting with certain large shippers to perform these services. The result has been that the shippers had a dual relationship to the grain they handled: (1) with respect to their personal ownership of the grain, and (2) as agents of the carriers for its transfer. In the process of transfer these shippers cleaned, sorted, graded, clipped, mixed and otherwise treated

the grain with the result that when it moved forward to the various markets it was in condition for immediate inspection and sale. At first the commission ruled that the allowances made by certain of the carriers for such elevation and transfer, $1\frac{1}{4}$ cents per 100 pounds, notwithstanding the important advantages these elevator contractors had over competitors, did not constitute a violation of the act; upon reconsideration, the commission attempted to separate elevation as a part of "transportation" from commercial elevation which is necessary for cleaning, sorting, grading, clipping and mixing and held that the allowance for elevation or transfer in transit should not exceed three-fourths of a cent per 100 pounds; more recently however the commission has ruled that the commercial advantages derived from elevation in transit are so great, and the service of transfer in transit so interwoven with purely commercial elevation, that no allowance should be made therefor to the owners of the grain. This ruling was reversed by the United States circuit court (176 Fed. 409), and decision was affirmed by the supreme court in 32 Sup. Ct. 2 (Nov. 1911), on the ground that such order was beyond the power of the commission. The court sustained the order of the commission reducing the allowance to costs of service, confining the allowance to grain reshipped within ten days. See *infra*, § 247.

For commission rulings see 10 I. C. C. R. 309; 12 I. C. C. R. 85 and 111; 13 I. C. C. R. 498; 14 I. C. C. R. 315, 317 and 551; 15 I. C. C. R. 90 and 147; 16 I. C. C. R. 337, 479 and 590; 17 I. C. C. R. 158; and 18 I. C. C. R. 364.

§ 152. The amendments of section as to accessory charges.—The third paragraph of this section was amended by the Hepburn Act by the omission of the words "or for receiving, delivering, storage, or handling of such property," and by changing the phrase "reasonable and just" to "just and reasonable." The latter change is without significance, and the omission noted was due to the fact that the definition of "railroad" and of "transportation" contained in the second paragraph, as amended, supplied the omission.

§ 153 (117). Carriage of live stock and perishable property. The character of the property may impose upon the carrier distinct obligations with respect to the manner of carriage and de-

livery. Thus in the case of live-stock, the company is under a legal obligation to provide suitable and necessary means and facilities for receiving live-stock offered for shipment, and this duty cannot be efficiently discharged, at least in a town or city, without the aid of enclosed yards in which the stock offered for shipment may be handled with convenience and safety and without inconvenience to the public. The railroad company therefore cannot, in addition to the customary and legitimate charges for the transportation, make a special charge for merely receiving and delivering stock in and through the yards provided for the purpose. *Covington Stockyards Co. v. Keith*, 139 U. S. 128, 35 L. Ed. 73. The court in this case applied the rule laid down in *Northern Pennsylvania Railroad Co. v. Commercial National Bank of Chicago*, 123 U. S. 727, 31 L. Ed. 287, that the undertaking of a carrier to transport livestock differed in some respect from the responsibility assumed in the cartage of ordinary goods and included the delivery of such live-stock, the difference referred to growing out of the nature of the particular property transported.

A railroad carrier could make an exclusive contract with a stock yards for delivery of livestock, provided no charge was made for delivering when taken by consignee within reasonable time. *Covington Stock Yards v. Keith*, *supra*; *Butchers & Drovers' Stock Yards Co. v. L. & N. R. Co.*, 14 C. C. A. 290, 31 U. S. App. 252, 67 Fed. Rep. 35, 10 I. C. C. R. 173; *Central Stock Yards v. L. & N. R. Co.*, 192 U. S. 568, 48 L. Ed. 565. See, *infra*, section 3. In the case of the Union Stock Yards of Chicago (*Commission v. C. B. & Q. R. Co.*, 186 U. S. 320, 46 L. Ed. 1182), the supreme court affirmed the circuit court of appeals (43 C. C. A. 209, 103 Fed. 249), in refusing to enforce an order of the commission holding unreasonable the charge of two dollars for the delivery of the live-stock to the stockyards. It seems that prior to 1894 no separate terminal charge was made; and the through rate existing prior to 1894 was presumed to have provided compensation for services for making deliveries to the stockyards. The court said that the defendants had the right to divide their rates, and that the terminal charge must be separately considered as a distinct charge, and if it was reasonable as a separate charge it did not follow that it should be reduced when the through rate was reduced.

The court therefore affirmed the decree of the court of appeals without prejudice to the commission's right thereafter to commence proceedings to correct any unreasonableness in the rate resulting from the additional terminal charge as to any territory. As to reasonable charges for extra hazard to carrier in live-stock shipments, see 10 I. C. C. R. 327, and 333.

A railroad company accustomed to deliver cars of cattle at stockyards off its line by transporting them over a line belonging to a stockyards company, for which it pays a fixed sum per car, was held in *Walker v. Keenan*, 19 C. C. A. 668 and 73 Fed. 755, by the circuit court of the United States, seventh circuit, to be under no obligation to consignees whose business was located at the stockyards to supply unloading facilities at its own stations in a different part of the state, and hence was not bound in default thereof to deliver at the stockyards without a separate charge. It could on posting schedules to that effect, as required by section 6 of the Interstate Commerce Act, make a charge for the freight to the station and a separate terminal charge of a fixed sum per car for delivery to the stockyards. Reversing 64 Fed. 922 (1896).

The subject of terminal charges for delivering car loads of live stock was considered by the supreme court in *Interstate Commerce Commission v. Stickney*, 215 U. S. 98, 54 L. Ed. p. 112 (1909), where the court, affirming 164 Fed. 638, held that a terminal charge for delivering car loads of live stock at the Union Stock Yards, at Chicago, a point beyond the carrier's line, if in itself just and reasonable and separately stated in the tariff schedules as required by the act, could not be condemned on the ground that if taken with the prior charges of transportation of the carrier or connecting carriers, it made a total charge unreasonable. The carrier was entitled to have a finding that any particular charge was unreasonable and unjust before it is required to make a change and that for any services that it may render or procure to be rendered off its own line or outside the mere matter of transportation of its own line, it may charge and receive compensation. The court, therefore, affirmed the circuit court in enjoining the enforcement of the order of the Interstate Commerce Commission, requiring the reduction of the terminal charge from two dollars to one dollar per car.

§ 154. Refrigeration in transit.—Irrespective of the requirements of the Interstate Commerce Act, it is the duty of the carriers undertaking the transportation of perishable traffic requiring refrigeration in transit to provide ice and facilities for such transportation in connection with the traffic; and the charges therefor are charges in connection with the service and are subject to the requirement of reasonableness contained in this section as to interstate shipments. Adequate refrigeration was held to be an incident of seaworthiness under a bill of lading for ocean transportation of dressed beef. See *Martin v. Southwark*, 191 U. S. 1, 48 L. Ed. 65 (1904). See also the ruling of the commission, 6 I. C. C. R. 295.

Under the amendment of 1906 the charges for “ventilation,” “refrigeration,” or “ice” must be separately published as other charges in connection with transportation.

In *Atlantic Coast Line v. Garaty*, 166 Fed. Rep. 10 (1908), it was held by the circuit court of appeals of the fourth circuit that where the carrier had facilities for furnishing shippers of vegetables refrigerating cars to transport the same, which cars the carrier did not own as a part of its equipment and plant, and the shipper in reliance thereon had raised vegetables which required refrigerator cars for transportation to the market, he was entitled to recover damages sustained by the carrier's failure to furnish such cars for the transportation of plaintiff's vegetables on reasonable demand. The court in this case cited and relied on the ruling of the supreme court in *Covington Stock Yards Co. v. Keith*, 139 U. S. 129, 35 L. Ed. 73 (1891) where the court said the carrier must at all times be in proper condition both to receive from the shipper and deliver to the consignee according to the nature of the property to be transported as well as the necessities of the respective localities in which it is received and delivered.

It was held by the court of appeals of the eighth circuit in *Knudson-Ferguson Co. v. Michigan Central Railroad Co.*, 148 Fed. 968 (1906), that a shipper could not recover in an action under section 8 an extra charge for icing service shown by the schedule, but separately, which had been collected from him, without proving that the charge was unreasonable.

The carrier is therefore bound to furnish refrigeration cars by reason of the common-law duty, but it can provide such cars

by purchase or lease, and if by lease, the lease can be made with one company. Charges for refrigeration of cars furnished should be published and adhered to, and in the transportation of the freight, the carrier must either furnish the ice for a reasonable price, or permit the shipper to do so. The exceptional conditions of refrigerator car service, such as the necessity for rapid transit, the expense of handling, the uncertainty of the crops, the frequent absence of return load, etc., are all factors to be considered in determining the reasonableness of the charges.

The subject of reasonable charges and regulations in providing refrigeration has been considered by the commission in several cases. See the Georgia Peach Growers' Case, 10 I. C. C. R. 255, and 12 I. C. C. R. 178. In 20 I. C. C. R. 106, the Arlington Heights Fruit Exchange Case, the rates for icing service from California points were considered by the commission. The subject had become one of great importance through the enormous development of the business of transporting fruits from California and the southern points. In this case, on account of the difference of opinion as to the amount of ice required for refrigeration, the commission conducted a series of experiments to ascertain the fact. The commission found that the railroad charges for what is known as "standard refrigeration" of oranges in transit from California points east were not unreasonable; but that the pre-cooling charges made by the railroads were unreasonable, as those shippers who had devised and perfected the system of pre-cooling for shipment should not be compelled to pay for the privilege of using it more than a fair cost to the carrier for providing the additional facilities, which were not included in the ventilated car rate, with a fair profit; and it was therefore reduced from thirty dollars per car to not exceeding seven dollars and a half per car. The report in this case discussed in detail pre-cooling as done by the shipper, and as it may be by the carrier, as well as standard refrigeration in transit. In the Georgia Fruit Exchange Case, 20 I. C. C. R. 623, the commission considered the actual condition of Georgia peaches as offered for refrigerator transportation, and ruled that without pre-cooling, satisfactory refrigeration was only possible for a portion of the carload required under the tariffs of the railroad.

It seems from the investigations of the commission in these

cases, that refrigeration in transit can properly be relied upon to keep the shipment cool during the journey, providing it was cool at the start of the journey, and should not be relied upon to reduce high temperature in the article as offered for transportation, and that the shipper should therefore prepare commodities offered for refrigeration by pre-cooling in order that the icing provided by the carriers may be effective.

It seems also that where there is no preparation of the fruit by pre-cooling, the commission will not reduce the carload weight, if by so doing, without reducing the carload rate, the carrier's net earnings would be unduly reduced. The condition of the article offered for refrigeration should be such that proper refrigeration is a possibility, and the carrier cannot be held responsible for deterioration due to inherent vices, hidden defects, or a natural development of the article, such as normal ripening and subsequent rotting, providing the carrier itself is without negligence in prompt transportation.

§ 155. Private cars.—The amendment of 1906 included "cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership, or any contract, expressed or implied, for the use thereof."

It would seem that the owners of equipment would have been included as parties subject to the act under the Elkins Act of 1903. Prior to this enactment, the commission had considered the general subject of private freight cars in its annual report for 1904, where it said that a practical monopoly had been created in the use of private cars for the movement of certain commodities, which has enormously increased the cost of transportation to the public.

Prior to the amendment of 1906, it had been held in *Interstate Commerce Commission v. Reichman*, 145 Fed. 235, C. C. of Ill. 1906, that a private car company which has delivered cars to railroad companies for the use of shippers, receiving pay from the railroad companies on a mileage basis, was under the jurisdiction of the commission and that under the act as amended in 1903, it could inquire into the operation and tariffs of the company and compel the necessary testimony concerning the conduct of the business.

For ruling of the commission and the commerce court sustaining the exaction by railroads of demurrage on private cars, see *infra*, § 254.

§ 156. The prohibition of passes.—The anti-pass provision of this act was first inserted by the amendment of 1906 and should be read with section 22 of the act, see *infra*, section 22. Under the original act there was no express prohibition of passes, but their issuance as a personal favor had been held both by the commission and the supreme court to be within the prohibition of section 2. *Infra*, § 219. Section 22 was originally adopted as an amendment to the act of 1889, with a proviso added in 1895. The supreme court said in the *Party Rate Case*, 145 U. S. 263, 36 L. Ed. 703 (1892), that its purpose settled beyond doubt that discrimination in favor of the persons therein named was not unjust. The provision of this section differs from section 22 in that it relates only to passengers, that is, there is no authorization thereunder for the free carriage of property belonging to persons of the excepted classes.

This anti-pass amendment in section 1 substitutes an express statutory prohibition of interstate passes with specific exceptions. It is in effect a statutory declaration that the non-excepted passes are acts of unjust discrimination, as the recipient of a pass is subjected to a penalty as well as the carrier who gives one. See *American Express Co. v. U. S.*, *supra*.

In *L. & N. R. R. Co. v. Mottley*, 219 U. S. 467, 55 L. Ed. — (1911), reversing 133 Ky. 615, it was held by the supreme court that this section prohibited railroads from issuing passes for interstate transportation even on contracts made before the passage of the Hepburn rate law.* In this case the parties were injured on the railroad in 1871, and to settle their claims for damages the railroad agreed to carry them free as long as they lived. The court said that the purpose of the statute was to cut up by the roots every form of discrimination, favoritism, and inequality, except in certain excepted classes, and that congress had not placed therein persons who had contracts for the issuance of

* This decision also in effect reversed the ruling of the circuit court of Kentucky in 150 Fed. 406, which was reversed and case dismissed for want of jurisdiction in 211 U. S. 149, 53 L. Ed. 126.

passes and that the court could not add an exception based on equitable grounds when congress had forbore to make such an exception. The words of the act, therefore, mean that the carrier cannot charge, collect, or receive for transportation on its road anything but money.

This ruling was followed in *C. I. & L. R. Co. v. United States*, 219 U. S. 486, 55 L. Ed. 305 (1911), affirming 163 Fed. 114, where the acceptance of advertising in payment of interstate transportation under contract, though authorized by the state statute incorporating the company, was adjudged illegal.

Where a pass is issued to an employe and the employe delivers it to a person not authorized to use it, and such party does use it on an interstate journey, he is guilty of violation of the act, and the employe is also guilty of aiding and abetting in such violation. *United States v. Williams*, 159 Fed. 310, D. C. of Ala. 1908. Also in the district court of Iowa, *United States v. Martin*, 176 Fed. 110, the court held that one who had in his possession such pass and sold it to another knowing he was not the person named therein, with the intent that he should use it, which he does by riding an interstate journey, was guilty of violating the statute.

The commission has ruled (12 I. C. C. R. 15) that newspaper employes on special newspaper trains are not included in the excepted list entitled to free transportation. Also that railroad companies have no right to extend free transportation to the local transfer and baggage express company (12 I. C. C. R. 39); that the local company not being subject to the regulating statute could give free transportation to whomever it wished, but that a carrier subject to the jurisdiction of the act could not lawfully grant free transportation to the officers of the local company. This was subject to the specific exceptions noted in the act as to baggage agents entering trains near a large terminal to arrange for baggage transfer. Land and immigration agents, unless they are bona fide and actual employes of carriers subject to the act, are not within the excepted classes. 12 I. C. C. R. 7.

§ 157. The commodities clause.—The 4th paragraph of the 1st section of the act was inserted in the amendment of 1906.

and is known as the "Commodities Clause," because it declares that after May 1, 1908, "it shall be unlawful for any railroad company to transport "in interstate commerce" any article or commodity other than timber and the manufactured products thereof" wherein it has an interest direct or indirect. The commodities clause was held valid by the supreme court in *United State v. Del. & Hud. Co.*, 213 U. S. 366, 53 L. Ed. 836, in 1909; reversing the U. S. court of appeals of the third circuit, 164 Fed. 215. The court decided that the provision was a lawful exercise of the power of congress and that the exception in favor of timber and the products thereof did not invalidate the provision. As the court construed the clause, however, the bona fide ownership by a carrier of stock in a producing company does not constitute a direct or indirect legal interest in the carrier in the commodity manufactured, mined or produced within the meaning of the act (Harlan, J., dissenting). The penalty clause of the act was not involved in the decision, but the court ruled that in any event it was separable. In this case it was also decided that a company organized as a canal company and only operating a railroad as an incident to mining, was subject to the act as to its interstate business.

This ruling as to the effect of stock ownership was very materially qualified in the case of *U. S. v. Lehigh Valley R. R. Co.*, 220 U. S. p. 257, 55 L. Ed. — (April, 1911), which was in substance but a sequel to the commodity cases of 1909. These cases having been reversed and remanded for further proceedings, application was made by the United States in one of them, the *Lehigh Valley* case, to file an amended bill, charging that the railroad company was not only the owner of all the stock issued by the coal company, but that the railroad company so used the power of its stock ownership, as to deprive the coal company of all real independent existence, and to make it virtually but an agency of the railroad company,—and that the coal company was not a bona fide mining company, but was merely an adjunct or instrumentality of the defendant. The circuit court declined to permit this amendment to be filed, and entered a decree dismissing the bill. The supreme court held that this was an abuse of discretion, that the proposed amendment was germane to the original cause of action, and was not foreclosed by the previous decision. While the right of a railroad company

as a stockholder to use its stock ownership for the purpose of a bona fide separate administration of the affairs of a corporation in which it has a stock interest may not be denied, yet the use of such stock ownership in substance for the purpose of destroying the entity of a producing corporation, and of commingling its affairs in administration with the affairs of the railroad company so as to make the two corporations virtually one, brings the railroad company so voluntarily acting as to such producing corporation within the prohibition of the commodities clause. The decree of the circuit court was, therefore, reversed and the cause remanded for further proceedings. It is, perhaps, a fair inference from these cases that while a railroad company may own stock in a mining company, it cannot use such ownership for the control of such subsidiary company without falling within the prohibition of the act.

For rulings of the commission and the courts as to the rights and duties of a carrier in transporting its own products prior to the enactment of this statute, that is, as to a discrimination of a carrier in favor of itself as a shipper, see *infra*, § 214. And see also *N. Y., N. H. & H. R. R. Co. v. Commission*, 200 U. S. 361, 50 L. Ed. 515, decided February 19, 1906, where it was held that a railroad could not give a rebate on its own coal carried by it, and a contract for such delivery was void, and it was immaterial that the contract might not have been open to this objection when made, and that the inadequacy of the price was caused by strikes and other reasons beyond the control of the carrier. The carrier, therefore, could not lawfully stipulate to sell and transport coal at a rate of prices insufficient to yield the published freight rates, after deducting the cost of purchase and delivery.

§ 158. Switch connections.—The last paragraph of section 1 was added in 1906, the original act having no provision with respect to switch connections. This paragraph has been strictly construed by the commission, not only because of its terms but by reason of the inadvisability of cutting the carriers' rails without grave necessity. It is to be noted that all the act requires is a "switch connection with any such lateral, branch line of railroad, or private side track." The act does not require the carrier in any case to build or furnish laterals, or branch lines

of railroad, or private side tracks, but it does require the carrier to construct, maintain and operate a switch connection with private sidetracks, etc., which have been constructed to connect with its railroad, provided such connection is reasonably practicable, can be put in with safety and will furnish sufficient business to justify construction and maintenance. 16 I. C. C. R. 587. Safety, practicability and an offer of sufficient business are the necessary elements to a demand for a switch connection, but the commission's jurisdiction can only arise upon a complaint filed after a demand in writing upon the carrier has been made.

It was ruled by the supreme court in *McNeill v. Southern Ry. Co.*, 202 U. S. 543, 50 L. Ed. 1142, affirming 134 Fed. 82, in May, 1906, prior to this amendment, that a state commission had no authority to compel a carrier to deliver cars containing interstate shipments beyond its right of way to a private siding. Whether such an order, applicable only to state business, would be repugnant to due process of law under the constitution, was not decided. This amendment as enacted in 1906, made no provision for complaints by a lateral branch line railroad, but only by a shipper, and it was held by the supreme court in *I. C. C. v. D. L. & W. R. R. Co.*, 216 U. S. 531, 54 L. Ed. 605 (1910), affirming 166 Fed. 498, that a complaint by a lateral branch line was not within the statute. The paragraph was amended, therefore, in 1910, so that it now provides for the making of such complaint by any shipper or owner of a lateral branch railroad.

The commission has ruled, 14 I. C. C. R. 191, that this provision of the statute does not grant plenary discretion to the commission as to the advisability of switch connections. It is subject to three conditions: (1) That the switch connection shall be reasonably practicable; (2) that it can be put in with safety; and, (3) that it will furnish sufficient business to justify the construction and maintenance of such switch connection. While retaining the right to control the location of the switching track of private industries in accordance with the evidence, the commission has said that it is disposed, in recognition of the risk that arises from such interruption of through rails, to leave the location of such tracks largely to the discretion and wisdom of the carrier. 12 I. C. C. R. 503. It has also ruled that the connection should be made at the expense of the party asking for the same. 12 I. C. C. R. 270. For history of commission's rul-

ings, see 12 I. C. C. R. pages 193, 202 and 545; 18 I. C. C. R. 310; 20 I. C. C. R. pages 56 and 486; 21 I. C. C. R. 183.

§ 159. The establishment of through routes.—The amendment of 1906 made it the duty of the carrier to establish through routes and just and reasonable rates applicable thereto, and the amendment of 1910, added thereto: “and to provide reasonable facilities for operating such through routes and to make reasonable rules and regulations with respect to the exchange, interchange and return of cars used therein, and for the operation of such through routes, and providing for reasonable compensation to those entitled thereto.”

This duty of establishing through routes that is thus imposed upon the carrier, should be read with the provision of section 15, as amended, *infra*, § 372.

§ 160. Classifications, regulations and practices.—The amendment of 1910 inserted as the fourth paragraph of section 1, a new legislative declaration of the law with respect to classifications of property and the regulations and practices of the carriers concerning tickets, receipts, bills of lading; the methods of presenting, marking, packing and delivering property for transportation; the facilities for transportation; the carrying of baggage of various kinds; and all other matters necessarily connected therewith. This clear announcement of the legislative intent has rendered obsolete the doubt sometimes expressed with respect to the jurisdiction of the commission over these matters. Prior to the passage of the Hepburn Act in 1906, the jurisdiction of the commission over these matters was limited by the fact that the commission had no authority to make rates, or what would be equivalent thereto, for the future. But wherever a classification resulted in an unjust or unreasonable charge under section 1, or in undue prejudice or discrimination under sections 2 and 3, the commission has always had jurisdiction and has asserted such power from the very first.

§ 161 (119). Charges must be reasonable and just.—The last paragraph of the first section in its original form providing that all charges for any service rendered in the transportation of persons and property, shall be reasonable and just, and prohibiting

and declaring unlawful every unreasonable charge for such service, is only an affirmance of the common law. In England, a common carrier was bound to carry for a reasonable remuneration as he was bound to carry all persons and property offered for transportation and suitable to be carried, though it was not uniformly held that the carrier was bound to carry for all at the same rate. In the *Maximum Rate* case, 167 U. S. 479, 42 L. Ed. 251 (1897), the supreme court said that this section was a simple enactment of the common law requirement, and that for more than a hundred years it had been the affirmative duty of the courts to execute and enforce the common law requirement that all charges should be reasonable and just. This requirement of reasonableness grew out of the relation of the carriers' occupation to the public as was declared in the *Granger* cases, 94 U. S. 113, 24 L. Ed. 77 (1877), where the court said that the carrier must carry when called upon to do so, and that he could charge only a reasonable sum for the carriage, and in the absence of any legislative regulation upon the subject, the courts must decide, as they did for private persons when controversies arose, what is reasonable.

§ 162 (120). **Practical difficulties in the enforcement of reasonableness in rates.**—There are few if any cases wherein recovery has been had at law upon the common law liability of the carrier for charging excess over a reasonable rate. As said by the supreme court, in the *Trans-Missouri* case last cited, any individual shipper would in most cases be apt to abandon the effort to show the unreasonable character of the charge, because of the necessary expense of time and money to prove the fact, and the risk of incurring the ill-will of the road itself in all its future dealings with him.

Furthermore, the question of what is reasonable is one of fact, dependent upon the special circumstances of each case, and as these circumstances are changing from time to time, a rate which is unreasonable when paid, may become reasonable, through changed conditions, before the case is determined in the court of last resort, or even in the trial court. See conclusion of opinion in *Smyth v. Ames*, 169 U. S. 1. c. 549, 42 L. Ed. 819 (1898).

Another reason for the practical difficulty in the way of enforcement by shippers of this common law obligation of the carriers to charge only a "reasonable rate," lies not only in the

delay and expense of litigation, and in the small amount involved in the payment of the charge for any one shipment, but in the fact that a party paying the unreasonable charge without protest, in the absence of any mistake or fraud, was denied any right of action. But see *Cook v. C. R. I. & P. R. Co.*, 81 Iowa, 551, and 9 L. R. A. 764 (1890), where held that payments made by shippers in ignorance of discrimination and after the assertion of the carrier that no lower rates were given, are not voluntary payments within the rule that they could not be recovered back.

Even assuming that recovery was had, the enforcement by different juries of their own standards of reasonableness,—for it must be in each case a question of fact at last,—would be necessarily destructive of the uniformity which is essential in any permanent regulation of transportation for both shippers and carrier. See remarks of Phillips, J., in *Windsor Coal Co. v. C. & A. R. Co.*, 52 Fed. 716 (1892). It was suggested, however, by the United States court of appeals in *Southern Pacific R. Co. v. Colorado Fuel & Iron Co.*, 42 C. C. A. 12, 101 Fed. 779 (1900), that it was impossible that a jury verdict would lead to a withdrawal of the rate adjudged unreasonable.

The above discussion as to the practical difficulties in the enforcement of reasonableness in rates has been rendered historical and academic by the amendments of 1906 and 1910, and by the construction placed upon the law by the supreme court in the *Abilene Cotton Oil Case*, 204 U. S. 426, *infra*, sec. 9 of act. This case involved:

The scope and effect of the act to regulate commerce upon the right of a shipper to maintain an action at law against a common carrier to recover damages because of the exaction of an alleged unreasonable rate, although the rate collected and complained of was the rate stated in the schedule filed with the Interstate Commerce Commission and published according to the requirements of the act to regulate commerce, and which it was the duty of the carrier under the law to enforce as against shippers.

The court unanimously held:

That a shipper seeking reparation predicated upon the unreasonableness of the established rate must, under the act to regulate commerce, primarily invoke redress through the Interstate Commerce Commission, which body alone is vested with power

originally to entertain proceedings for the alteration of an established schedule, because the rates fixed therein are unreasonable.

In discussing the reasons why concurrent jurisdiction as to the propriety of rates under the act could not be had between the courts and the commission, the court said:

“For if, without previous action by the commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that unless all courts reached an identical conclusion a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question. Indeed the recognition of such a right is wholly inconsistent with the administrative power conferred upon the commission and with the duty, which the statute casts upon that body, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed.”

§ 163 (121). Standard of reasonableness under state statutes. Under state statutes re-asserting this common law requirement of reasonableness and providing for the publication of tariffs and charges and their submission to and approval by state commissions, it has been held that the common law right is superseded by the statute and that there can be no recovery for alleged unreasonableness in the charges thus published and approved, as the published rates will be conclusively presumed to be reasonable. *Young v. Kansas City, St. J. & C. B. R. Co.*, 33 Mo. App. 509 (1889); *Windsor Coal Co. v. C. & A. R. Co.*, *supra*; *McGrew v. Missouri Pacific R. Co.*, 114 Mo. 210 (1893); *Railroad Co. v. People*, 77 Ill. 443; *Sorrell v. Railroad Co.*, 75 Ga. 500; *Burlington, C. R. & N. R. Co. v. Dey*, 82 Iowa, 312. In the latter case, in answer to the claim that the commissioners' rate would not secure the accused from conviction, if it was excessive, the court said that the state would be precluded from denying that the rate was reasonable.

§ 164 (127). Standard of reasonableness under the act.—The principle whereon these decisions concerning state statutes were

based was applied to the act to regulate commerce in the case of *Van Patten v. C., M. & St. P. R. Co.*, 81 Fed. 545, decided by Shiras, J., in the circuit court of the northern district of Iowa, and in *Kennedy v. Terminal Railroad Ass'n*, 81 Fed. 802, by Adams, J., in the circuit court of eastern district of Missouri. These cases were decided in 1897 before the amendment of the act in 1903, wherein the published schedule was made conclusive against the carrier. It was held in both cases that in order to recover it must be shown that the rate was unreasonable according to the provision of the acts, and that it was a good defense to an action for damages for unreasonable charges that the carrier had adopted and posted a properly proportionate schedule of rates under section 6. These cases were both brought under the assumed election given by sections 8 and 9, without appealing to the commission to adjudge the rate unreasonable and for reparation. Prior to these cases in 1893 in *Swift v. R. R. Co.*, 64 Fed. 59 (N. Dist. of Illinois) it had been held by Grosscup, J., that there was no common law of recovery in the federal court, and that under the act plaintiff could not recover without averring that no rates were published as required by the act.

Since the amendment of 1903, *infra*, § 422, the posted rate is the definite and conclusive standard of reasonableness subject to the finding of the commission that the rate so scheduled is unreasonable. As to the power to allow reparation in damages for unreasonable rates, see *infra*, sections of act 14 and 16; as to limitation of right of action under sections of act 8 and 9, see section 6 of act, *infra*.

There is no presumption, however, that a rate is reasonable in law, because it had been filed and published by the railroad with the commission. *Illinois Central R. R. Co. v. Commission*, 206 U. S. 441, 51 L. Ed. 1128 (1907.)

§ 165 (123). **The power of the commission in fixing rates.**—During the first ten years of its existence, the commission claimed and exercised the power of fixing rates *in futuro*; that is, when a rate was adjudged unreasonable, to determine what rate was reasonable, and to direct the carrier to reduce the rate to the designated maximum. Illustrations of the decisions by the commission during this period will be found in their reports from 1887 to 1897. In 1896, it was decided by the supreme court, in

what is known as the Social Circle Case, 162 U. S. 184, 40 L. Ed. 935; and the following year in the Cincinnati Freight Bureau Case, 167 U. S. 479, 42 L. Ed. 243, that congress had not conferred upon the commission the power to prescribe rates, whether maximum, minimum or absolute, and in the latter case, it said that congress might have fixed the rate itself, or committed to some subordinate tribunal the duty, but that it had not done so. For statement by the commission of its powers under these decisions, see 7 I. C. C. R. 286, and report of the commission for 1898, pages 23 to 27.

As the effect of these decisions was to give the carriers the power to establish rates independent of the judgment of the commission, leaving the commission only the power to pass upon the reasonableness of specific rates, the amendatory act of 1906 conferred upon the commission in express terms the power to determine and prescribe what would be the just and reasonable rate or rates, charge or charges to be thereafter observed in such cases as the maximum to be charged. See sec. 15, *infra*. By the act of 1910, the power of the commission has been further enlarged so as to include the suspension of an increase of rate announced by the carrier before the same takes effect. See sec. 15, *infra*.

§ 166. No power in the courts to fix rates.—The fixing of rates for the future is a legislative or administrative, and not a judicial duty. This distinction and the limitations of judicial power in this matter were pointed out by the supreme court in the decision in the Virginia Rate Case, 211 U. S. 216, *supra*: “A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts, and under laws supposed to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative not judicial in kind.”

It was ruled in this case that a corporation commission empowered by state constitution to fix rates *in futuro* was not a court in the proper sense of the term, as such a power was not a judicial power.

See also *Southern Railway Co. v. Colorado Fuel & Iron Co.*, *supra*.

Thus, it was ruled in 1897 (when the commission was not empowered to fix rates), by the circuit court of Washington, in *Farmers Loan & Trust Co. v. Northern Pacific Ry. Co.*, 83 Fed. 249, that an order of the commission (5 Interstate Commerce Rep. 478), that commodity rates must not be lower than necessary to meet competition nor to be applied to articles not subject thereto, was a mere general statement of the duty of the railway company as defined by the law, and was too indefinite to be the basis of a decree by the court to enforce obedience.

§ 167 (125). The federal courts on reasonableness of railroad rates.—While it is not within the judicial power to fix rates for the future, it is a judicial duty to pass upon the reasonableness of rates when they are presented to the court. The question of reasonableness in railroad rates has been construed by the federal courts in two distinct classes of cases. Thus, in the judicial review of state imposed rates upon intrastate business, *supra*, §§ 95 to 97, the court determined whether carriers have been deprived of their right to make reasonable charges, that is, whether the state imposed rates are in any sense confiscatory, thus depriving them of their property without compensation; while in questions arising under the commerce act the question is raised whether the rates charged by the carrier or which he seeks to impose exceed what is reasonable. In the first class of cases the burden of proof is upon the carrier to show that the state has fixed unreasonable limitation upon his rates; while in the other class of cases, where the shipper complains of an existing rate, the burden is upon him to show that the carrier has exceeded a reasonable standard. Under the recent amendment to the act in 1910, when the carrier proposes an advance over existing rates and objection is made thereto, the burden is upon the carrier to show the reasonableness of the advance.

The supreme court said in the *Maximum Rate Case*, *supra*, that a rate may be unreasonable because it is too low as well as because it is too high. In the former case it is unreasonable and unjust to the stockholder, and in the latter to the shipper. In *Turnpike Road*, *supra*, 164 U. S. 578, l. c. 597, 41 L. Ed. 560, the court said, in determining the question

of reasonableness, its duty was to take into consideration the interest both of the public and of the owner of the property.

In the Minnesota Rate Case, 186 U. S. 257, 46 L. Ed. 1151, involving a specific state imposed rate, the court said (p. 268) that each case must be determined by its own considerations, and while railroads were entitled to a fair return upon the capital invested they were not justified in charging exorbitant rates even in order to pay operating expenses if the conditions of the country do not permit it. It sometimes happens that, for purposes of ultimate profit and for building up a future trade, railways carry both freight and passengers at a positive loss; and while it may not be in the power of the commission to compel such a tariff, it could not upon the other hand be claimed that the railroads could in all cases be allowed to charge grossly exorbitant rates as compared with rates paid upon other roads, in order to pay dividends to stockholders.

The subject of valuation of property for rate making has been thoroughly discussed in the federal courts in cases concerning the alleged confiscatory character of state imposed rates. See *supra*, Part I, Chapter VII.

In the Turnpike Road Case, *supra*, the court said that a corporation performing public services was not entitled as a right and without reference to the interests of the public, to realize a given per cent. upon its capital stock; that stockholders were not the only persons whose rights or interests were considered, and that the rights of the public were not to be ignored.

In the San Diego Water Rate case, 174 U. S. 739, 43 L. Ed. 1155 (1899), the court said it was "the real value of the property which should be taken into consideration. What the company is entitled to demand in order that it may have just compensation, is a fair return upon the reasonable value of the property at the time it is being used for the public. The property may have cost more than it ought to have cost, and its outstanding bonds for money borrowed and which went into the plant may be in excess of the real value of the property."

On the general subject see also Kansas City Stock Yards case, 183 U. S. 79, 46 L. Ed. p. 92 (1901), involving the rates in the Kansas City Stock Yards, and the Metropolitan Trust Co. v. R. R. Co., 90 Fed. 683 (1898), United States circuit court of Texas, on Texas state rates.

§ 168 (126). The value of railroad property as a basis for rate regulation.—The value of the property devoted to the public service is recognized as a factor, but not the only factor, in rate making. It has been uniformly held, both by the commission and the courts, that it is the present cost or, as it is sometimes phrased, the cost of reproduction when the issue of the reasonableness of the rates is investigated, and not the original cost which is to be determined as a factor on the question of the reasonableness of rates. Evidence of the cost, however, may be admissible in determining the ultimate fact of present value; but where the cost is shown evidence is admissible to show the depreciation of the property values. It is for the purpose of determining this actual present value that the commission has urged a physical valuation of the interstate railroads.

It is in connection with this determination of the present value of the property that the matter of capitalization has been considered. The supreme court said, in the *Nebraska Rate Case*, *supra*, that in determining value as a basis for making rates, capitalization and the original cost of construction, the amount expended in permanent improvements, the market value of bonds and stocks, the probable earning capacity under the rates, and the sum required to operate the business, were all matters for consideration and should be given such weight as would be just and right in each case. The court concluded by saying that there may be other matters to be regarded in estimating the value.

In the *Knoxville Water case*, 212 U. S. p. 12, 53 L. Ed. 371, which was a case involving the validity of maximum rates for a local water company, the court said that the stock of the company which appeared to have been issued to a contractor for construction and in excess of the true value, was not the true measure or guide in determining valuation. The cost of the tangible property, it was said, must be diminished by depreciation; and it was intimated that the company should have the benefit of any appreciation of the tangible property.

In the *Consolidated Gas case*, 212 U. S. 19, 53 L. Ed. 382, decided at the same term (1909), involving the rates of gas companies in New York, the court said that the value of the property was to be determined as of the time when the inquiry was

made regarding rates, and that if the property which legally entered into the consideration of the question of rates had increased in value since it was acquired the company was entitled to the benefit of such increase. It added, however, that while such was the general rule there might be an exception where the property may have increased so enormously in value as to render a rate permitting a reasonable return upon such increased value unjust to the public.

§ 169. The unearned increment in valuation of railroad property in rate regulation.—In the Advance Rate Case (February 22, 1911) it was contended by the Burlington railroad, one of the applicants for the increased rate, Western Trunk Line Case, 20 I. C. C. R. 307, that it was entitled as a matter of legal right to a fair return upon the actual value of its property used for transportation, which value, from whatever source in the past created, is measured in its case by at least the cost of presently reproducing its physical plant. To obtain such fair return, it claimed the right to charge ratio of transportation which, subject to the one limitation that the particular rates are themselves reasonable and just to the shipper, will produce such reasonable return upon the property employed. It was claimed that largely through the increased value of its real estate holdings as well as through the putting of earnings of the company into the property the actual fair value of the railroad far exceeded its capitalization and that therefore it was entitled to freight increase as a reasonable return upon the actual value of the property.

But the commission declined to admit this contention and said whatever the true economic or legal view may be as to the right of a carrier to consider the increase in value of its land as a part of the value upon which it is entitled to a reasonable return, such increase in value does not of itself establish the right of a carrier to increase the rate upon a given service.

The commission said it was yet to be decided that a public agency created by public authority may continuously increase its rates in proportion to the increase of its value either (1) because of betterments which are made out of income or (2) because of the growth of the property in value due to the increase in value of the land which the company owns.

§ 170. The relation of railroad rate to investment of earnings in property.—It was ruled by the supreme court in Illinois, *Central R. Co. v. Commission*, 206 U. S. 441, 51 L. Ed. 1128 (1907), affirming the order of the commission in 10 I. C. C. R. 505 (the Yellow Pine Association Case), that improvements which add to the permanent value of the property, and are paid from earnings are not properly charged to operating expenses in determination of the reasonableness of rates.

The court said it would seem as if “expenditures for additions to construction and equipment, as expenditures for original construction and equipment, should be reimbursed by all of the traffic they accomodate during the period of their duration, and improvements that will last many years, should not be charged against the revenue of a single year.” The court distinguished the *Union Pac. R. R. Case*, 99 U. S. 402, 25 L. Ed. 274, as not involving rates, or the rights of shippers.

In the *Advance Rate Case in Official Classification Territory*, 20 I. C. C. 243 (Feb. 1911; see *infra*, § 376), the commission said that this principle seemed to apply also to non-revenue producing improvements, forced by public demand, such as expensive passenger stations, abolition of grade crossings in cities, adoption of safety appliances and the like. It was suggested however that while this seemed to be the law, public policy might under some conditions lead to a different conclusion, so far as favoring the accumulation of surplus from earnings in improving a system. The question whether the investment from earnings belonged to the public or to the stockholders was not determined; the commission saying “until the status of this surplus is determined by legislative action or judicial interpretation, this commission cannot properly permit an advance in rates, with the intent to produce an accumulation of surplus for this purpose.”

§ 171 (130). Reasonableness under sections 1 and 3.—The reasonableness of rates under section 1 must be distinguished from undue and unreasonable preferences of localities, which are prohibited by section 3. Thus it was held in *Commission v. N. C. & St. L. R. Co.*, 120 Fed. 934 (1903), that a finding of unreasonableness under section 1 could not be established merely by a proof of a violation of section 3. That is, that a rate may

be reasonable *per se* and still be unduly preferential of a locality, and thus be violative of section 3. A rate which is unreasonable, however, *per se*, may be shown by the same facts to be unduly preferential of the locality as compared with other localities. See *infra*, section 3.

§ 172 (131). **Consideration of reasonableness in the courts.**— In *Commission v. Southern Railway Co.*, 117 Fed. 741 (1902), the circuit court of the western district of Virginia said that in determining the issue as to whether rates to and from a city were unjust and unreasonable in themselves, the greatest weight should be given to the opinion of expert witnesses, the effect of the rates charged upon the growth and prosperity of the city, the cost of transportation as compared with the rates charged and the rates in force to other cities where the circumstances are as nearly the same as may be. In this case the court refused to enforce an order of the commission directing reduction of rates to Danville, Virginia. 122 Fed. 800 (1903).

In *Commission v. L. & N. R. Co.*, 118 Fed. 613 (1902), the court found that the rates to Savannah from certain points on the Pensacola division of the Louisville & Nashville road were unreasonable and said that they could not be justified by the contention that the railroad company had been building up a port and thus securing a longer haul. The court said that rates unreasonable in themselves could not be justified by considerations of this character. In this case an advanced rate filed with the Interstate Commerce Commission and put into effect pending the hearing before the commission on the legality of the rate previously in force, was held properly before the commission on such hearing.

On the issue of reasonableness in rates, the sworn return of the officers of the road made to state authorities for the purposes of taxation is admissible but not conclusive. *L. & N. R. Co. v. Brown*, 123 Fed. 946 (1903).

In *Commission v. Lehigh Valley R. Co.*, 74 Fed. 784 (1896), the court said that the fact that the cost of carriage of all the coal of an entire railroad system from all points of the shipment to all destinations was a certain per cent. of the gross receipts from coal did not justify the conclusion that on a particular line of part of the system the cost of carriage bore the same relation to

the gross receipts of the whole line, and that the commission erred in holding the contrary theory.

The carriage of expensive merchandise is entitled to greater compensation than that of cheap goods. *Commission v. D. L. & W. R. Co.*, 64 Fed. 723 (1894).

§ 173 (132). **Rulings of the commission upon the reasonableness of rates.**—The commission, though prior to 1906 it had no power to determine what rate a railroad should charge, has during the whole period of its existence been vested with the important jurisdiction of investigating and determining whether rates are reasonable or unreasonable. The supreme court has in several cases wherein it differed from the commission in the conclusions of law as to the construction of the act, remanded the cases to the commission for its own investigation upon the question of the reasonableness of the rates, or has entered judgment without prejudice to the commission's right to re-investigation of the question of reasonableness of the rates. *Interstate Com. Com. v. Clyde Steamship Co.*, 181 U. S. 33, 45 L. Ed. 731 (1901); *L. & N. R. R. Co. v. Behlmer*, 175 U. S. 676, 44 L. Ed. 409, *supra*.

In many cases the conclusions of the commission have been accepted and acted upon by the railroad companies in the adjustment of their rates, and though its conclusions may be recommendations and not judgments, they none the less have a permanent value and constitute a body of the administrative law on this difficult question of railroad administration. The opinions and conclusions have the greater weight from the character of the membership since the organization of the commission, and from the thoroughness of its investigation, as evidenced by the opinions.

Under the enlarged jurisdiction of the commission under the acts of 1906 and 1910, its rulings have vastly increased in importance.

In the recent ruling denying the advances in rates in the *Western Traffic Line Cases*, *supra*, the commission summarized its powers, saying: "It is doubtless true that in its control over the charges which the railroads make, this commission exercises a power so extensive as to justify the broadest consideration of the economic and financial effects of its orders, but the government has not undertaken to become the directing mind in rail-

road management. This commission is not a general manager of the railroads, and no matter what the revenue the carriers may receive there can be no control placed by the commission upon its expenditure, no improvements directed, and no economies enforced."

In the same opinion the basis of the policy in the more congested portions of the country as to rates was stated as follows: "First, a basic classification of commodities with relation to their relative value, bulk, fragility, and other proper transportation considerations, upon which is built a wisely balanced schedule of charges fixed with reference to well-defined zones of distributive territory; and, beneath these, those special rates on certain commodities as to which the public need demands that exceptions shall be made."

In 14 I. C. C. R. 376, the commission said it had no authority to establish general rate schedules, but must deal with the interstate rates of this country which had not been established upon any definite theory as it finds them. What the commission takes off in one place, it cannot add in another. Unless, therefore, the general result of all rates is to yield an undue revenue to the carrier, the commission should not reduce a particular rate simply because it might have thought in establishing that rate *de novo* as part of a general scheme it ought to be somewhat lower or somewhat higher in proportion to the others. The rate attacked must be so out of proportion as to be unreasonable and must so discriminate as to be undue and unlawful as to some other rates. This case involved the rates upon live stock from Iowa points to Chicago, and the commission thought that while the general level of the rates ought not to be reduced, that the groupings of territory wherein the specific rates were effective should be revised.

§ 174. Limitations of the commission's power in fixing rates. While it is recognized that neither the commission nor any public regulative body can reduce rates below what is termed the confiscatory limit, that is, so as to deny the carrier a reasonable return upon the property devoted to the public service, its power is also limited, in that in determining the reasonableness of a rate, it cannot reduce a reasonable rate for the sake of encouraging or protecting any business interest of the shippers.

This was illustrated in the ruling of the supreme court in *Southern Pacific Railroad v. Interstate Commerce Commission*, 219 U. S. 433, 55 L. Ed. — (1911), reversing the circuit judges of the ninth circuit in 177 Fed. 963, which had enforced an order of the commission, 14 I. C. C. R. 61, which directed the railroad to reduce the rate on lumber from the Willamette Valley points. The court said the commission had no power to fix rates upon the assumption that it had the right to protect the lumber interests from the consequences of a change in rates, even if the change was from a rate which had been fixed unreasonably low for the purpose of encouraging the industry, though the higher rate thus reduced was not in itself unjust or unreasonable.

To the same effect is the ruling by the commerce court (October 5, 1911, — Fed. —) in the *Arlington Heights Fruit Association Case*, where the court said that the commission had no power to protect the lemon industry of California against foreign competition, and as the order of the commission in 19 I. C. C. R. 148, was based primarily on such assumed authority, it was void.

It seems from the opinions in these cases that if the commission had based its orders upon findings that the rates were unreasonable *per se*, and that the reduction was necessary to make them reasonable *per se*, such conclusions of the commission would not have been disturbed.

§ 175 (134). Presumptions of reasonableness from established rates.—In the determination of such an indefinite problem as the reasonableness *per se* of a given rate, dependence must necessarily be had upon the presumptions of fact which the circumstances afford rather than on those of law.

Thus it is ruled that the long continuance of a rate is an admission of reasonableness; and where, in reliance upon existing rates, capital has been invested and industrial conditions established, such rates cannot be discontinued without taking into account its effect upon these commercial and industrial conditions (15 I. C. C. R. 59): but the voluntary reduction of a rate does not carry with it the conclusive presumption that the prior rate was unreasonable (15 I. C. C. R. 11), and the long continued maintenance of a lower rate raises no presumption of law that a newly established higher rate is unreasonable (17 I. C. C. R. 313).

There may be an inference of unreasonableness in a voluntary reduction of rates by a carrier, but not conclusive. 8 I. C. C. R. 561. For presumption of unreasonableness from change of rates by carriers, see 6 I. C. C. R. 295.

After a rate has been raised by a carrier, it is still presumed to be reasonable until shown to be unreasonable, excepting in cases under the amendment of 1910, whereunder the carrier is compelled to prove the reasonableness of the increased rate. A lower rate via one line is not conclusive evidence of unreasonableness of higher rate by another line. 15 I. C. C. R. 107, 15 I. C. C. R. 49.

As to absence of legal presumption of reasonableness from publication of rate, see Yellow Pine rate case, 206 U. S. 441, *supra*.

§ 176 (133). **The burden of proof.**—It necessarily follows from this presumption of reasonableness of the existing statutes that the party complaining has the burden of proof to show unreasonableness. The commission has uniformly ruled that rates cannot be declared unreasonable where no proof is offered but that of comparison. I. C. C. R. 230, and 1 Int. Com. Rep. 627. A rate is not unreasonably simple because a lower rate is in effect on lines of other carriers. 17 I. C. C. R. 286. Parties complaining must, therefore, make proof of unreasonableness in hearings before the commission.

As to the burden of proof on justification of increases under amendment of 1910, see *infra*, sec. 15.

§ 177. **Considerations in the determination of reasonableness.** The commission has ruled (see 13 I. C. C. R. 651), that a carrier has no right to attempt to dictate the use to which commodities transported by it shall be put; or to fix the rate for one use higher than where the commodity is shipped for a different use. In this case the railroads sought to impose a higher rate upon nitrate of soda when used for the manufacture of explosives than when used for fertilizers.

The commission cannot accept as conclusive any stipulation of parties as to the reasonableness of rates, 16 I. C. C. R. 426. The conclusions of the commission on such matters must be reached with a due consideration for the conclusions which it has

already announced on the same subject, and for the knowledge which it has gathered with relation thereto in other cases. The willingness of the shipper to receive, and of the carrier to pay, reparation upon certain traffic and under certain rates, can be approved by the commission only under a clear and decisive showing of facts which would lead the commission to award such reparation in opposition to the carrier's wishes.

It was said in 17 I. C. C. R. 15, that agreements covering rates could be evidence of an admission as between the parties executing it and had strong evidentiary value that the rate agreed upon is reasonable. The rate which was advanced as the result of an agreement among carriers, even if such agreement was under color of violation of the Anti-Trust Act, will not on that account alone be declared unreasonable, 12 I. C. C. R. 451. Evidence of such violation is pertinent, but the existence of such unlawful agreement, even when proved, is not conclusive of the unreasonableness of the rate so advanced.

§ 178. What is a reasonable rate.—A just and reasonable rate is neither the minimum charge that can be made for the service and permit the carrier to live, neither is it the maximum charge that can be borne by the shipper. An absolute rate may possibly be also a just and reasonable rate but the presumptions are against it by reason of its inflexibility. Between the minimum and maximum limitations, rates to be just and reasonable should be flexible and should permit compliance with sections 2 and 3 of the act forbidding discriminations, as well as section 4 with respect to long and short hauls. Assume that the out of pocket cost to the carrier for any transportation is 10 cents, assume further that the traffic would not move if the rate were fixed as high as 30 cents. In such a case a rate of 10 cents ordered by a commission would amount to confiscation of the carrier's property and a rate of 30 cents would be injurious to both carrier and shipper. A rate of 11 cents in such a case would permit of a large movement and whether it would be compensatory to the carrier or not would depend upon the carrier's financial condition and whether the increased movement fell short of over-taxing the carrier's facilities. If a rate of 20 cents under such conditions permitted reasonably free movement of the traffic, and if a rate of 15 cents yielded some approach to a fair

return upon the carrier's investment, the reasonable rate might be fixed at anything between these two figures. In the *Western Advance Rate Case*, 20 I. C. C. R. 307, on pages 347, 348, the commission said:

"Thus we return to the question, What is the reasonable rate that shall be charged to the shipper? The legislature may not make rates so as to confiscate the carrier's property. The carrier, on the other hand, may not make rates which are unjust to those who by economic necessity are compelled to employ its services. Here, then, we have the minimum of legislative power and the maximum of the carrier's power. Between these lies a zone, indefinite and variable. Without question the carrier will tend toward the maximum, while governmental authority will be inclined—in fact, has been created—to repress its upward tendency. One moves inevitably upward to the highest rate which the traffic will bear; the other attempts to discover some relation between charge for service and cost of service."

There is clearly a zone of reasonableness within which any rate is compensatory or just and reasonable to the carrier and fair to the shipper, or just and reasonable to the public. Within this reasonable zone, for any particular traffic, rates as between different localities are to be adjusted with regard to each other to comply with other sections of the act.

§ 179. Res judicata with respect to rates.—There can be no such thing as res judicata in respect to rates. In practice, however, the publication and maintenance of a rate by a railroad estops it, ordinarily, from denying that the rate so published is just and reasonable, or compensatory so far as the carrier is concerned; by the act the orders of the commission with respect to rates expire after a period of two years; and the finding or order of the commission or the action of a carrier on its own initiative is merely declaratory of what the rate ought to have been in the past, or what it shall be for the immediate future and is always subject to revision. In 19 I. C. C. R. 34, the commission said: "It ought to be perfectly apparent that rates which are reasonable at the present time may within a period of two years become very unreasonable, by reason of changes in circumstances and conditions, economic, transportation or the like. It should be just as apparent that a rate which was unreasonable two years

or more ago may become reasonable by reason of such changes in conditions. We think the plea of estoppel by reason of former adjudication is not good insofar as the present rates on these articles are concerned."

§ 180 (128). Through rates and local rates.—The distinction between the through and local services of a railroad, i. e. its reasonable right to make the local rates greater than the proportionate part of a through rate over the same distance, has been recognized in the decisions of the commission and also of the courts. The distinction has also been considered in the state rate case (see *supra*, § 126), as the through rates are usually, but not always, interstate rates, and local rates are usually intrastate; but not infrequently, as when great cities are contiguous to state lines, such local rates are interstate.

As to the comparative cost of local business as compared with through business, see South Dakota Rate Case, 176 U. S. 167, 44 L. Ed. 417, and the Minnesota Rate Case, 186 U. S. 257, 46 L. Ed. 1151. In the latter case it was claimed by the carrier that the sum of two admittedly reasonable local rates could not be unreasonable as a through rate between two designated points. But the court said that the practice of railroads in this country was almost universally to the contrary, the through rate being almost invariably less than the sum of the locals.

See also discussion of through and local rates in *Augusta S. R. Co. v. Wrightsville*, 74 Fed. 522 (1896.)

The commission has discussed this distinction in a number of cases, and has uniformly held that the through rate should be less than the sum of the local rates. 3 I. C. C. R. 252, 2 Int. Com. 604; 8 I. C. C. R. 377; 9 I. C. C. R. 17; 7 I. C. C. R. 323; 6 I. C. C. R. 488.

Through rates and through billing are matters of agreement among carriers engaged in interstate commerce, excepting where established by order of the commission; and when they have been established and entered or finally abrogated or changed they are required by the statute to be kept open for public use. See *infra*, sec. 6, and 9 I. C. C. R. 182.

Through rates are not required to be made on a mileage basis nor local rates corresponding with the division of a joint through rate over the same line. Mileage, however, is usually an element

of importance, and due regard to distance and proportions are to be observed in connection with other considerations. They are material in fixing transportation charges. 3 I. C. C. R. 252, 2 Int. Com. Rep. 604; 8 I. C. C. R. 377.

A rate is none-the-less a through rate in law, because the initial carrier charges its local rate as part of the through rate and the remaining lines charge an agreed rate made by percentage.

While there is no mileage requirement in the act other than what may be required in the long and short haul rule in sec. 4 and the general requirement of reasonableness, as a rule in the transportation of freight of railroads, while the aggregate charge is continually increasing the further the freight is carried, the rate per mile is constantly growing less, making the aggregate charge less in proportion every hundred miles after the first, arising out of the character and cost of the service; and thus staple commodities and merchandise are enabled to bear the charges from and to the most distant portions of the country. 1 I. C. C. R. 480 and 1 Int. Com. Rep. 764; 2 I. C. C. R. 315 and 2 Int. Com. Rep. 199. On this general rule as to local rates, 3 I. C. C. R. 450, and 2 Int. Com. Rep. 721; 1 I. C. C. R. 152 and 1 Int. Com. Rep. 356; 6 I. C. C. R. 488; 8 I. C. C. R. 277; 2 I. C. C. R. 584, and 2 Int. Com. Rep. 414; 7 I. C. C. R. 323.

This admitted right of carriers to fix through rates on a lower relative basis than local rates has led not only to the allowance of the through rate for commodities manufactured enroute, as in milling in transit and compressing in transit privileges, but also to illegitimate devices to secure such lower through rate. See milling in transit, *infra*, sections 2 and 3 of the act.

While the commission has uniformly said that the through rates should not exceed the sum of the locals, it has made no general rule on the subject, see 12 I. C. C. R. 498; and each case must be disposed of upon its merits.

§ 181. Reasonableness in commutation rates.—In what is known as the Commutation Rate Case (21 I. C. C. R. 428), the commission in an interesting opinion considered the origin and history of commutation fares and the distinction between such traffic and other passenger traffic, and reached the conclusion that the commutation traffic stands by itself as a special and distinct kind of service for which the carrier may demand no

more than a reasonable compensation. The case involved the commutation rates on the different railroads doing a commutation business in the vicinity of New York. All the railroads denied the authority and jurisdiction of the commission over the reasonableness of commutation fares, basing their contention on the language of section 22 of the act, which provides that "nothing in the act shall prevent * * * the issuance of mileage, excursion and commutation passenger tickets." It was admitted, however, that such fares were subject to secs. 2, 3 and 4 of the act. The commission said that commutation rates were peculiar, in that suburban homes had been established and communities built up in reliance upon reasonable commutation service. The commission reached the conclusion that while the service was peculiar, it was a special and distinct kind of service for which the carrier could demand no more than a reasonable compensation. The new commutation fares of the Pennsylvania Railroad Company were held to be excessive, but those of the other railroads were not found to be unreasonable, except in particular cases specified.

§ 182 (139). Relation of interstate to state rates.—The relation of the interstate to state rates, where the carrier is doing business with the same track and equipment under the regulations of two sovereignties in our complex form of government, has been considered, see *supra*, Part I, Chapter VII. The act to regulate commerce contains no provision, whereby interstate rates must be reduced because intrastate rates are lowered by state commissions (7 I. C. C. R. 601); nor are state rates required to be lowered because of the reduction of interstate rates. It was said by the commission (15 I. C. C. R. 29) that no greater sanctity is presumed in favor of rates established by state railroad commissions than of those voluntarily established by the carriers themselves; but when the commission is asked to examine an interstate rate, similar rates established by state authority in that territory must have great influence, especially when they have been long acquiesced in by the carriers. (14 I. C. C. R. 376.) Still, those state rates have no binding force upon the commission. They are standards of greater or less value, according as they appear to be just and reasonable. As to the competitive effect of state

imposed rates upon interstate traffic, and the diverse rulings of the federal circuit courts thereon, see Part I, *supra*, § 110.

§ 183. Rates as affected by the development of the country.— In a rapidly developing territory, the changed conditions created by the growth of population and business may necessitate changes in rates to meet these altered conditions. This has been illustrated in the recent rulings of the commission reducing the Interstate Class Rates from Seattle, Tacoma and Portland to Idaho, Washington and Montana, 19 I. C. C. R. 265; and also the rates between Mississippi river and Missouri river to Utah points, 19 I. C. C. R. 218. See also 19 I. C. C. R. 238, where points in the western defined territory to points in Nevada were unreasonable. Some of these cases involved the long and short haul rule, see fourth section, *infra*. Rates to the coast had been fixed by water competition, and the rates to the interior were made by adding locals to these through rates. The commission said in 19 I. C. C. R. 238, that the manufacturing center of the country had moved westward, and the Atlantic routes which were once necessitated are now almost unused. The commission said the time had come in their opinion when the carriers west of the Rocky Mountains must treat the intermountain country upon a different basis from that which had theretofore obtained. See also 19 I. C. C. R. 162, holding the rates from Spokane to St. Paul and Chicago were unreasonable. See 15 I. C. C. R. 376.

These cases involve not only the reasonableness of the rates *per se*, but also the alleged preference in violation of sections 3 and 4, see *infra*, § 294.

§ 184. The commission on the interdependence of rates.— The commission has also considered the position of strong companies with good credit and weak companies with embarrassed credit, competing for business between the same points, and it was held that it would be unjust to the shipper to base rates upon the needs of the weaker road. In 11 I. C. C. R. 238 (1905), in an investigation of the class and commodity rates from St. Louis to Texas points, it declined to interfere with the advance made by the railroads, on the ground that their financial condition at that time was not favorable. It was said in the Utah cases, 19 I. C. C. R. 218, where expensively built mountain roads

were under consideration, that in fixing a rate the commission would not look exclusively to that line which could handle the business cheapest or which was the strongest financially, but would consider the weaker rival; but it did not consider that the rates should be fixed with reference to the weakest line, and it would certainly be unjust to the public in deciding these rates to consider merely the expensive and circuitous routes.

§ 185. The commerce court on the interdependence of rates. The newly established United States commerce court in one of its earliest opinions, in *Receivers & Shippers Association of Cincinnati v. The Commission* (July 1911), in sustaining the commission in its refusal to declare unreasonable a rate from Cincinnati to Chattanooga, 188 Fed. 242, declared its full concurrence in the view of the commission that in the determination of the reasonableness of a rate, it should not consider only the particular carrier making the same; but on the contrary, should consider the rates in a particular territory or the rates of other carriers to be affected by the change of the particular rate or rates in question, and the court added: "We think this court may take judicial knowledge of the fact that the interstate rates prescribed for the transportation of freight by common carriers must necessarily be more or less interdependent, or at least be so related to each other that the rate-making power will not, simply because it has the power, fix the rate upon a single line of railroads which will necessarily disorganize the established and reasonable rates on other roads in the same territory. All rates established in accordance with law are presumed to be just and reasonable. It is for this reason that the rates for the transportation of freight by other carriers in the same territory may be looked into, as evidence of what each paid as just and reasonable rate, provided the conditions are the same. We cannot as a court not vested with the power to fix rates, say, beyond question, that the elements which the commission took into consideration in fixing the schedule complained of were not improper for the commission to consider, and therefore cannot conclude that the commission fixed a schedule of rates upon improper grounds."

It seems that in this case the commission had admitted in its opinion that if they took the defendant railroad by itself, that is,

the Cincinnati Southern, and determined the reasonableness of the rates by reference to cost of construction, cost of maintenance and profit upon the investment, that the rate would be found to be unreasonably high; but that in view of the interdependence of other rates, the commission hesitated to take action which would make widespread and far-reaching reductions of rates on other lines, when there was no special occasion for it. This case has been appealed to the supreme court,—the complainant contending, that while the commission could lawfully consider the interdependence of rates it could not make that consideration conclusive.

§ 186 (186). Reasonableness of rates as dependent on character of the traffic.—The commission has uniformly recognized that the character of the traffic is material in determining the rates and that the rates must be varied according to the value of the commodities as well as the cost of handling and the degree of risk to the carrier. Thus to make the rates on metals, coal, and other low grade freights yield per ton the average received on all freight would be unjust, and these considerations are the basis of classification. See *infra*, section 3. Thus coal is one of the most desirable kinds of traffic, with a small hazard of loss, and the cost of receiving and delivering is less than that of most other kinds of freight, and at the same time it is an article of universal necessity in daily life and the basis of industries. See 10 I. C. C. R. 337.

In 14 I. C. C. R. 23, the commission said that lumber was a low grade commodity and should move at low rates, especially when the haul is long, as it moved in large quantities, was loaded by the shipper and unloaded by the consignee, was shipped in both closed and open cars, was loaded to a high economic car load rate didn't require special or expedited movement, was not easily injured in transit and caused few damage claims. In such commodities it is also true that their comparatively low value as compared with weight necessitated low rates to enable them to be carried any distance. On the other hand, the increased hazard to the carrier in transporting live stock is properly taken into account in fixing the tariff. 10 I. C. C. R. 327. See also 5 I. C. C. R. 514 and 4 Int. Com. Rep. 223; 6 I. C. C. R. 488.

In the circumstances to be considered are all questions bearing upon the cost of service by the carrier, including any special services rendered the shipper, such as rapid transit and increased cost of handling. 2 I. C. C. R. 73 and 2 Int. Com. Rep. 49.

Greater value alone is not conclusive of the reasonableness of a higher rate of freight on a given article than upon another commodity of the same general character, especially when the incidents of transportation are identical, 21 I. C. C. R. 522.

§ 187 (137). **Distance as a factor in rates.**—The commission has uniformly ruled that distance is an important factor in determining the reasonableness of rates and ordinarily the standard, but not always controlling. It has been said to be controlling in the absence of other influential conditions. 7 I. C. C. R. 180. Distance by the shortest route has been frequently considered in determining the rate on another and competing line, and the distance by the shortest available route has been taken as a basis of differentials in grain rates. 7 I. C. C. R. 481.

When the act to regulate commerce was before congress, the mileage basis for rates was suggested but not adopted. The commission said in I. C. C. R. 629, 2 Int. Com. Rep. 9, that the fact that the rates were not fixed on a mileage basis does not necessarily make them either illegal or unjust, and the commission has no power to make an order requiring the adoption of such a basis. See also 2 I. C. C. R. 52, 2 Int. Com. Rep. 41.

Where rates seemingly reasonable are made by a number of carriers in a widely extended territory and are relatively fair so far as the evidence shows, the commission will not order these rates changed at one important point, thereby throwing the rates of the entire system into confusion for the purpose of conforming to the mileage basis. 2 I. C. C. R. 315, 2 Int. Com. Rep. 199.

For illustration of the blanketing of rates in a considerable territory securing substantial equality between producing points and markets, and the denial of the contention for rates based upon distance, see 17 I. C. C. R. 169. The commission has refused to change rates reasonable in themselves to equalize commercial conditions, or to enable cities to secure traffic from their own territory, 6 I. C. C. R. 195; as rates cannot be fixed to overcome natural advantages, or for the purpose of equalizing commercial conditions. See preferences as to communities, *infra*, § 241.

The rule of increased aggregate rate and decreased rate per ton per mile as distance increases, while general, is subject to qualifications and exceptions. 9 I. C. C. R. 17. Charges are not proportion to distance where distances are considerable and the distances between the points relatively small. 5 I. C. C. R. 264 and 4 Int. Com. Rep. 65. As to grouping of rates, *see infra*, section 3.

§ 188 (138). The commission on comparison of rates.—Rates reasonable in one section of the country may be unreasonable in another. 6 I. C. C. R. 121. There is no necessary connection between rates on traffic of the same kind or class in one direction and rates in the opposite direction, as special circumstances, such as flow of traffic, may justify higher rates in one direction than in the other; especially is this the case where the distance is of great length. 6 I. C. C. R. 121, 9 I. C. C. R. 642. The share of a through rate is not necessarily the measure of a reasonable rate, but is properly used as a basis of comparison in determining its legality, 6 I. C. C. R. 458; and the apportionment of through rates to the different parts of the through line may be significant of the question of the reasonableness of the through rate. 2 I. C. C. R. 131, and 2 Int. Com. Rep. 78. Local rates are not properly compared with through rates. 1 I. C. C. R. 401, 1 Int. Com. Rep. 703; 3 I. C. C. R. 534, 2 Int. Com. Rep. 778. Where a railroad owned two parallel lines, it was ruled that having accepted low rates on one of them, it should have provided corresponding advantages to the patrons of its other lines, allowances being properly made for any differences in conditions. 4 I. C. C. R. 79 and 3 Int. Com. Rep. 115.

In comparison with rates in other localities, dissimilar conditions and modifying circumstances are to be considered.

§ 189 (135). Reasonableness of rates as relating to cost of service and needs of the shipper.—The general considerations of public policy relating to the cost of production of the commodity and the needs of the shipper on the one hand, and the circumstances and financial condition of the carrier, such as are involved in the cases before courts relating to interstate traffic, have been considered by the commission in several cases, notably in the report to the senate in 1890 in response to a resolution of

the senate calling for such report, on the alleged excessive freight rates and charges on food products. 4 I. C. C. R. 48, 3 Int. Com. Rep. 93-151, and in the opinion of April 1, 1903, on the proposed advance in freight rates. 9 I. C. C. R. 382. Thus the circumstances of the carrier, its operating expenses, cost of transportation, grades, density or sparseness of population, volume of business, book charges, dividends, are all properly considered but are not controlling. See 2 I. C. C. R. 375, and 2 Int. Com. Rep. 289; 3 I. C. C. R. 473, and 2 Int. Com. Rep. 742; 6 I. C. C. R. 601. See also 2 I. C. C. R. 272, and 2 Int. Com. Rep. 162.

In the Spokane and Coast Rate Cases, 15 I. C. C. R. 376, in 1909, the commission ruled that the distribution of new stock of the Great Northern Railroad among the holders at par, though the market value was above par at the time of distribution, had no bearing upon the earnings to which the company was entitled, or on the rates which were under question. It was ruled, however, that the earnings on the railroads were excessive, and the freight rates were ordered reduced. The opinion in this case has an exhaustive review of the history and capitalization of railroads with a discussion of the relation of coast and inland rates. See also 9 I. C. C. R. 318.

The capitalization of a railroad, the commission has said, to have consideration in cases involving the readjustment of rates, should be examined by the history of the capital account, the value of the stock and various securities and the actual cost and the value of the property itself, as the making of the capital account alone the basis of legitimate earnings would place, as a rule, railroads conservatively managed and capitalized at an enormous disadvantage. 8 I. C. C. R. 158. But the circumstances of the carrier and its financial interests are not alone to be considered. 9 I. C. C. R. 160. While the expense of operation, liability to damage from sand drifts, etc., and the requirement of a return upon the investment of the carrier, are considered, the financial necessities of the carrier do not justify excessive rates. Railroads are entitled to share in the general prosperity of the country, but the cost of replacement and of new construction should not be charged to earnings and cost of operation so as to diminish net earnings and cause an advance of rates. 9 I. C. C. 382; 5 I. C. C. R. 156, and 3 Int. Com. Rep. 794. Rates on the lines of rival companies or different branches of the same company are properly considered. 6 I. C. C. R. 121,

I. C. C. R. 325, 1 Int. Com. Rep. 641, 6 I. C. C. R. 195; as also rates to contiguous points on same line. 2 I. C. C. R. 588, 2 Int. Com. Rep. 412.

On the question of reasonableness, it is immaterial whether the railroads combine or act separately. 2 I. C. C. R. 375, 2 Int. Com. Rep. 289. And an increase of rates for the purpose of securing certain lines of traffic from territory set apart to railroads under an agreement is *prima facie* unreasonable. 6 I. C. C. R. 195.

§ 190 (140). Reasonableness and proportion.—It was said by the commission in an opinion by its chairman, Judge Cooley, in an early case, 2 I. C. C. R. 231, and 2 Int. Com. Rep. 137, that the phrase “rates reasonable in and of themselves” was very likely to be misleading, and that it was not the theory of the act that reasonableness of rates could thus be separately and independently determined.

On the contrary, it is assumed in the act that persons, corporations and localities are interested not only in the rates charged them, but in the rates which are charged to others also, and that while the act does not require all rates to be proportionate, it nevertheless makes proportion an important element when the rates to any locality are to be determined. No rates therefore can be reasonable in and of themselves, in contemplation of the act, which are made regardless of proportionment. And in another case it was said (3 I. C. C. R. 534, and 2 Int. Com. Rep. 777):

“The terms ‘reasonable and just’ as used in the statute, as applied to rates are each relative terms. They do not mean to imply that the rates on every railroad employed in interstate commerce shall be the same or even about the same. The conditions and circumstances of each road surrounding the traffic, and which enter into and control the nature and character of the service performed by the carrier in the transportation of property, such as the cost of transportation, which includes volume or lightness of traffic, expense of construction and operation, competition in some respects of carriers not subject to the law, rates made by shorter and competing lines to same points of destination, space occupied by freight, and risk of carriage,—all have to be considered in determining whether a given rate is reasonable and just.” Tested by these a rate may be very reasonable and just as to one road, and not as to another.

As to the complexity of the question of adjusting rates so as to make them at once reasonable *per se* and in proportion, see *supra*, § 126.

§ 191 (141). The commission on rate wars and reasonableness of rates.—In the matter of the Chicago, St. Paul & Kansas City Railway Co. (2 I. C. C. R. 231, 2 Int. Com. Rep. 137), the commission in an opinion by Judge Cooley, considered this subject under an application for alleged violation of the fourth section of the act, and said that the act was not passed to protect railroad corporations against the misconduct or mistakes of their officers, or even primarily to protect such corporations against each other, and that the term “just and reasonable” is employed to establish a maximum limitation for the protection of the public, not in minimum limitation for the protection of reckless carriers against their own action. The commission conceded that there was evidence that in many cases railroad companies temporarily established rates which were not only below the fair compensation for their services, but if persisted in were destructive of their own interests as well as of the interests of its rivals; but carriers that made such unreasonably low rates were giving the public to understand that those rates were reasonable and remunerative and were doing very much to establish against themselves a low standard of rates for all time. The commission held that it had no power to order rates to be increased upon the ground that they were so low that persistence in them would be ruinous. This ruling was cited and approved by the supreme court in the Maximum Rate case, 167 U. S. 511, 1 c., 42 L. Ed. 257, the court saying that the argument showing that the commission had no power to fix a minimum or establish an absolute ratio went also to show that they had no power to fix any rate to control in the future (under the act prior to amendment of 1906).

Section 2.

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[Unjust discrimination defined and forbidden.]

§ 192 (143).—SEC. 2. That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand,

collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

§ 193 (144). **Origin of the section.**—This section has not been amended. It was said by the supreme court in the *Texas & Pacific Railway case*, 162 U. S. 197, l. c. 219, 40 L. Ed. 940, to have been modeled upon section 90 of the *Railway Clauses Consolidation Act of 1845*, 8 & 9 Vict. ch. 20, the first English statute regulating railways. This section is as follows:

“Sec. 90. And whereas it is expedient that the company should be enabled to vary the tolls upon the railways so as to accomodate them to the circumstances of the traffic, but that such power of varying should not be used for the purpose of prejudicing or favoring particular parties, or for the purpose of collusively or unfairly creating a monopoly, either in the hands of the company or of particular parties; it shall be lawful therefore, for the company, subject to the provisions and limitations herein and in the special act contained, from time to time to alter or vary the tolls by the special act authorized to be taken, either upon the whole or upon any particular portions of the railway, as they shall think fit; provided that all such tolls be at all times charged equally to all persons, and after the same rate, whether per ton, per mile, or otherwise, in respect to all passengers, and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine, *passing only over the same portion of the line of railway under the same circumstances*; and no reduction or advance in any such tolls shall be made either directly or indirectly in favor of or against any particular company or person traveling upon or using the railway.”

This section of the English law, known as the equality clause, differs from section 2 of the American act in the words “*passing only over the same line of railway under the same circumstances*,” which impart a very different meaning as construed in the English courts from the words “*under substantially similar circumstances and conditions*” found in the American act. The

English section as construed by the English courts was confined in its operation to shipments passing only over the same portion of the line between the same points of departure and the same points of arrival. See *M. S. & L. Ry. Co. v. Denaby Main Colliery Co.*, 4 Railway & Canal Traffic Cases, p. 452; *Murray v. G. & S. W. Ry. Co.*, 4 Railway & Canal Traffic Cases, p. 460; *Denaby Main Colliery Co. v. M. S. & L. Ry. Co.*, 6 Railway & Canal Traffic Cases, p. 141; *L. & Y. Ry. Co. v. Greenwood*, Law Reps. 21 Q. B. Div. pp. 217 and 218.

It appears from a statement made in the debate in congress by Senator Sherman, on May 14, 1887, that the words "and from the same original point of departure or from the same point of arrival" were at one time contained in section 2, but that these words were taken out by the conference committee, and the words "under substantially similar circumstances and conditions" adopted in lieu thereof. So that discriminations are "unjust" and violative of this section: *first*, when the service is like and contemporaneous; *second*, when it is rendered in the transportation of a like kind of traffic, and *third*, when the service is rendered under substantially similar circumstances and conditions. That is, all three of these conditions must concur.

§ 194 (145). Purpose of the section.—The purpose of this second section is the prevention of unjust discrimination between shippers by any form of device. It was said by the commission in its report on its investigation of the subject of "underbilling," 1 I. C. C. R. 633, and 1 Int. Com. Rep. 813, that the enumeration in this section of special rates, rebates, drawbacks and other devices showed the methods of favoritism which were presented most distinctively to congress in framing the act, and added: "The investigation which preceded the passage of the act had disclosed the fact that preferences were frequent, in fact were almost universal." The commission quoted from the report of the senate committee to the effect that the prevailing policy of railway management is but an elaborate system of special rates, rebates, drawbacks and concessions to foster monopoly, to enrich favored shippers and to prevent free competition in the many lines of trade in which the item of transportation is an important factor. The commission said that the act was prepared accordingly with these evils directly in view.

The section has been construed both by the commission and by the courts, in recognition of these evils which congress intended to remedy. The supreme court said in *Wight v. United States*, 167 U. S. 512, 42 L. Ed. 258, that the section was designed to compel every carrier to give equal rights to all shippers over its own road and to forbid it by any device to enforce higher charges against one than another.

In another case, *Union Pacific Railway Co. v. Goodrich*, 149 U. S. 680, 37 L. Ed. 896, the court said in construing a Colorado statute similar in terms, that the purpose of the Colorado statute was to apply to intrastate traffic the same wholesome rules and regulations which congress thereafter applied to commerce among the states, and to cut up by the roots the entire system of rebates and discriminations in favor of particular localities, special enterprises and favored corporations, and to put all shippers upon an absolute equality.

This section 2, however, does not deal with discriminations between and preferences in favor of or *against* localities, or with discriminations between *kinds of traffic*, which are dealt with in the succeeding section, but only with discriminations between shippers of the same kind of traffic, that is, where the service is in the transportation of a like kind of traffic "under substantially similar circumstances and conditions."

§ 195 (146). Effectiveness of the section. The act of February 19, 1903.—The effectiveness of the act is more distinctly expressed in the second section than in any other. The reasonableness of rates remains as complex and indefinite a problem as when the act was passed, and as will be hereafter seen, the anticipated prevention of the building up of trade centers to the prejudice of smaller towns has proven impossible of realization in the face of controlling competition, but in the question of discrimination between individuals, or classes of individuals in the same kind of traffic, the rulings of the court have been, with the exception of the Party Rate decision, in harmony with those of the commission. It may be said further, that the evils prohibited in this section are recognized by railway managers, so that they have in the main co-operated with the commission in their efforts for their suppression. Thus the commission said in its first annual report, 1887, in reviewing the operation of the act

for the first eight months in which it was in force, that it was justified in saying that the act had operated directly to increase railroad earnings by putting an end to rebates, drawbacks and special rates upon freight business, a result which was also found to be eminently satisfactory to the general public; and the investigations of the commission had not as yet disclosed the existence of unjust discriminations resulting from the use of those particular methods of preference in interstate traffic. "On the contrary, a vast number of instances have been found where special rates, rebates and drawbacks have been discontinued, and where preferences and advantages which were formerly thereby given, have been terminated."

In the intense competition of business, new devices for securing discriminating freight rates have been eagerly sought, and it appears from the subsequent reports of the commission that while discriminations are less openly given, the evil is far from being suppressed, particularly in the use of private cars in freight traffic, in the division of rates with terminal railroads owned or controlled by shippers and in other devices. See report of 1904, pages 12 to 19, and 10 I. C. C. R. 385, 10 I. C. C. R. 450. The act of February 19, 1903, commonly known as the Elkins bill, has very materially enforced this section. This law, *infra*, § 422, requires carriers in all cases to publish their tariffs and prohibits "any practice on the part of the carriers whereby any such property shall by any device whatever be transported at a less rate than that named in the tariff * * * or whereby any other advantage is given or discrimination practiced." Under this amendment the practice of secret rebates from published rates, though made to all "similarly circumstanced" is made unlawful.

§ 196 (147). Common law as to discriminations.—It was said of the first section, as to the obligation to charge *reasonably*, that it was only a reaffirmation of the common law. This can be said only in a qualified sense of the obligation to charge *equally* imposed by the second section. In the Party Rate Case, 145 U. S. 271, 36 L. Ed. 703, the supreme court said that at common law it was even doubted whether carriers were bound to make the same charge to all persons for the same service, although the weight of authority in this country was in favor of equality of

charge to all persons for similar service. Several cases have held that while it was elementary that common carriers could charge no more than a reasonable compensation, the mere discrimination in rates was not illegal. If a rate charged one party was reasonable, he could not complain if another was charged a less rate; though the fact that another was charged less might be material as evidence for the jury tending to prove that the reasonable charge was the smaller one. Mr. Justice Blackburn in *Great Western Railway Co. v. Sutton*, L. R. 4 H. L. 238; *Johnson v. Pensacola, etc. Co.*, 16 Fla. 623. In *Cowden v. Pacific Coast Steamship Co.*, 94 Cal. 470 and 18 L. R. A. 221, the court intimated that it was because the common law was not clearly settled on this point that it was necessary for parliament to enact the stringent equality clauses, and that there was a lack of direct authority in this country for the reason that common carriers, especially railway companies, had been placed entirely under the control of statute laws.

On this question of the right of discrimination at common law, see *Ex parte Benson*, 18 S. C. 38; *Baxendale v. Railway*, 4 C. B., N. S. 63. In the latter case, in 1858, it was said that though a carrier was limited to a reasonable charge, there was no common law obligation to charge equal rates to all customers. It followed that he could discriminate in the purpose of securing traffic which would otherwise go by another route. *Ragan v. Aiken*, 9 Lea (Tenn.), 609 (1882.)

In *Menacho v. Ward*, 27 Fed. 529 (S. D. of N. Y.), decided in 1886, the court, Wallace, J., conceded the right to discriminate, and said the courts had always recognized the rights of carriers to regulate their charges with reference to the quantities of merchandise carried for the shipper, either at a given shipment or in a given period of time, although, said the court, public sentiment in many communities had objected to such discrimination and had crystalized into condemnation of the practice. The court however refused to apply this principle to the case where the carrier (a steamship company), sought to make a discriminating rate in order to prevent competition, that is, by charging a higher rate to those who refused to patronize it exclusively.

See also later cases decided by the same court after the passage of the Interstate Commerce Act. Thus in *United States v. D. L.*

& W. R. Co., 40 Fed. 101 (1888), it was said that the Interstate Commerce Act had qualified materially common law rights and obligations of carriers. That at common law the carrier was not obliged to treat all who patronized him with absolute equality and that discriminations were only unreasonable, when they injured to the undue advantage of one person, or class of persons in consequence of some injustice inflicted on another.

See also the same court in *Interstate Commerce Commission v. Texas & Pacific R. Co.*, 52 Fed. 187.

§ 197 (148). Just and unjust discrimination at common law. The right of discrimination at common law was not unlimited, and the general statement found in some of the opinions that the carrier had the right at common law to consult its own interests, was qualified by the distinct recognition, especially in the latter cases, that this discrimination must be exercised within the limits of fairness and impartiality in view of the public duty owing by the carrier. See *C. C. C. & I. R. Co. v. Closser*, 126 Ind. 348 and 9 L. R. A. 754, decided in 1890. There is an obvious difficulty in the application of this principle in cases where the discrimination is sought to be justified on the ground of securing traffic which would not otherwise be secured, and in thus making concessions to large shippers, thereby giving them a distinct advantage over their competitors.

The trend of the later cases, both in the federal and state courts, irrespective of the Interstate Commerce Act, distinctly condemns discrimination based solely on the ground of the quantity of the freight shipped, as contrary to sound public policy and inconsistent with the obligations of the carriers to the public. Thus in *B. C. R. & N. R. Co. v. Northwestern Fuel Co.*, 31 Fed. (Iowa) 652, the Circuit Court, Brewer, J., held that at common law a contract whereby a railroad company made a rate of \$1.60 per ton to all shippers of 100,000 tons per month or over, with a rate of not less than \$2.40 per ton to those shipping less than 100,000 tons per month, was so arbitrary and obviously in the interest of capital as to be contrary to public policy and void, though it was not distinctly decided that any discrimination based upon the amount of shipments was permissible.

In another case, *Handy v. C. & M. R. Co.*, 31 Fed. 689, S. D. of Ohio (1887), Baxter, J., removed the receiver of a rail-

road for making a discriminating rate in favor of the Standard Oil Company of ten cents a barrel while charging a rival shipper thirty-five cents a barrel and agreeing to pay the twenty-five cents per barrel excess thus received over to the Standard Oil Company. This discrimination was sought to be justified because the Standard Oil Company had threatened to store its oil until it could lay a line of pipes unless the receiver should give such rates. The court said this was such gross and wanton discrimination as to warrant the removal of the receiver, although he had acted under the advice of counsel for what he deemed the protection of the interests of the railroad, and it did not appear that the money received from the rival shipper had been paid over to the Standard Oil Company.

In *Hayes v. Pennsylvania Co.*, 12 Fed. 309, decided in 1882, on common law principles before the enactment of the Interstate Commerce Act (Dist. of Ohio), Judges Baxter and Walker, it was held that discriminations based solely on the amount of freight shipped without reference to any conditions tending to decrease the cost of transportation, were discriminations in favor of capital and were a wrong to the disfavored party, entitling him to recover the difference between the amount paid by him and that paid by the favored competitor. The court in its opinion distinguished the case of *Nicholson v. Great Western Railroad Co.*, 28 L. J. C. P. 89, as in that case there was an undertaking to furnish a specific quantity of freight within a stated period. The court said in the *Hayes Case*, however, that while this English case was clearly distinguishable, future experience might possibly call for a modification of the principle there announced. This decision was approved in *Kinsley v. B. N. Y. & P. R. R. Co.*, 37 Fed. 181, decided in 1888, where the receiver of a railroad was directed to pay the claim for money exacted for freight, when a lower rate was charged to another shipper who shipped larger quantities of freight.

On the other hand, there is a class of cases where a reduced rate in consideration of the amount of shipment, where the shipment was attended with decreased expense to the carrier, was sustained, as was *Hoover v. Pennsylvania*, 156 Pa. 220, and 22 L. R. A. 263, and *L. & N. Consolidated R. Co. v. Wilson*, 132 Ind. 517, and 18 L. R. A. 105. In the *Pennsylvania* case cited, the Pennsylvania Constitution prohibited discriminations in

somewhat the same terms as section 2 of the Interstate Commerce Act, and the court held that the carrier had a right to discriminate in rates on coal in favor of a manufacturer, saying:

“Differences in freight rates on coal to manufacturers and mere dealers are and have been for many years in universal practice, and not a single case other than this has reached the courts of last resort, either in England or in this country, questioning the entire propriety and legality of such differences, and that circumstance is ample proof that both the professional and the lay mind recognize that the difference is legal.” The court cited in this case the decision of the supreme court of the United States in the *Party Rate Case*, *infra*.

In *Evershed v. London & Northwestern R. Co.*, L. R. 3 Q. B. D. 135, decided in 1877, the court conceded that a large business could be done at a cheaper rate than a small one, and that speaking generally, it was open to the railway company to make a bargain with a person provided they were willing to make that same bargain with another, although that other was not in a position to make it. In this case, however, it was held that a gratuitous carting, loading and unloading, by a railroad company for three firms of brewers in order to get their business, was an unjust discrimination against another brewer in the same place, the three being connected with another railway while the complainant was not connected with either railway.

On the other hand, the right to make *any* discrimination in favor of a shipper, where the ground of discrimination is based solely on the amount furnished for shipment, even when necessary to secure the traffic of the favored shipper, has been denied on the ground of public policy and the public duty of the carrier. See *Scofield v. Lake Shore & Michigan Southern R. Co.*, 43 Ohio St. 571; *State v. Railroad*, 47 Ohio St. 130. In *Hilton Lumber Co. v. Atlantic Coast Line R. R. Co.*, the supreme court of North Carolina, 1904, 60 C. L. J. 30, in a review of the cases, held that a railroad carrying raw material to factories could not charge a factory, agreeing to ship the manufactured product by the same road, less for the same service than it charged the factory which makes no such agreement, saying that discrimination was a more dangerous power than high rates, if the latter were charged impartially to all. It will be observed however that the facts of this case would permit the allowance of a through rate under the

milling in transit principle, as recognized under the Interstate Commerce Act. See *infra*.

As to other cases on the same general subject, see *Fitchburg R. Co. v. Gage*, 12 Gray, 393; *Spofford v. B. & M. R. Co.*, 128 Mass. 326; *Avinger v. So. Car. R. Co.*, 29 S. C. 265; *Railroad Co. v. Forsaith*, 59 N. H. 122; *Chicago, etc. R. Co. v. Suffern*, 129 Ill. 274; *Atwater v. Railroad Co.*, 48 N. J. Law, 55; *Cook v. C. R. I. & Pac. R. Co.*, 81 Iowa, 151, 9 L. R. A. 764. In this latter case the court held, that the allowance of a rebate by a carrier to certain of his customers, from the tariff rate charged other customers for precisely the same service, was sufficient of itself to show that the rate charged was unreasonable and unjustly discriminative.

See also *Great Western R. Co. v. Sutton*, L. R. 4 H. L. 238; *Messenger v. Penn. Co.*, 37 N. J. Law, 531.

§ 198 (149). Discrimination in charge based upon difference in service not discriminative.—While therefore there has been a difference of judicial opinion as to what constitutes unjust discrimination, at common law, with a distinct trend towards a clearer recognition of the public duty of the carrier and the public policy of equality of charge, it is also recognized that a discrimination is not unjust when it is based upon a substantial difference in the mode and kind of service.

Thus it was held by the supreme court of the United States in the case already cited as to the common law in the federal courts, *Western Union Telegraph Co. v. Call Publishing Co.*, *supra*, that common carriers, whether engaged in interstate commerce or in that wholly within the state, were performing public service. “They are endowed by the state with some of its sovereign power, such as the right of eminent domain, and so by reason of the public service they render. As a consequence of this all individuals have equal rights both in respect to service and charges. Of course such equality of right does not prevent differences in the modes and kinds of service and different charges based thereon. There is no cast iron rule of uniformity which prevents the charge from being above or below a particular sum, or requires that the service should be exactly along the same lines. But that principle of equality does forbid any difference in charge which is not based upon difference in service, and even when based upon difference in service must have some reason-

able relation to the amount of difference and cannot be so great as to produce an unjust discrimination.”

This was a case of alleged discrimination in telegraph rates which were then not subject to the Interstate Commerce Act.

§ 199 (150). Circumstances and conditions of through traffic and local traffic are dissimilar.—While competition between carriers cannot justify discrimination between individuals, competition may and does have an influence in determining the through rates, thus making them under essentially different circumstances and conditions from the local rates to other points on the same line. In such cases the reduced rate affected by competition is controlled by circumstances and conditions substantially dissimilar within the meaning of the act. But whether so controlled or not, it must be the same to all shippers under the same conditions. It has been uniformly held both by the commission and by the courts, that a local rate to a given point and the *pro rata* part of a through rate to the same point on the same line are not under similar circumstances and conditions.

The phrase “under similar circumstances and conditions” is found in sections 2 and 4. As hereafter seen, competitive conditions may create dissimilar circumstances and conditions between localities under section 4, but when the rates are thus fixed under dissimilar conditions, section 2 requires that shippers in any given locality must be treated alike for the same service. But through traffic is a different “kind of service” from local traffic. This was held in *Union Pacific Railway Co. v. United States*, 117 U. S. 355, 29 L. Ed. 920, in the construction of the act of congress of July 1, 1862, relative to the Union Pacific Railway company, and applied to the construction of the second section of the Interstate Commerce Act in the *Import Rate* case, 162 U. S. 197, 40 L. Ed. 940. It is not only in the presence of competition, but also in the increased cost of service, resulting from stoppages, that the conditions of through and local traffic are substantially dissimilar. *Chicago, etc., R. R. Co. v. Tompkins*, 176 U. S. 167, 44 L. Ed. 417. See *supra*, § 180.

§ 200 (151). Competition of carriers does not make circumstances dissimilar under section 2.—These words as used in section 2 refer to the matter of carriage, and do not include compe-

tion, that is, discrimination between individuals is not justified by the fact of competition with other carriers influencing the lower charge. Thus in *Wight v. United States*, *supra*, the court sustained the conviction of a railroad agent for making to a consignee, who had a siding connection with a competing railroad, an allowance or rebate for the expense of cartage from its own station. It was urged that the party who did not have this connection would have to go to the expense of cartage by whichever road he transported, and that therefore the traffic was not under the same circumstances and conditions within the terms of section 2. But the court said that the wrong prohibited by the section was a discrimination between shippers, and that the service in transporting to the station from the point of shipment was precisely the same to each shipper. The court concluded: "It may be that the phrase 'under substantially similar circumstances and conditions,' found in section 4 of the act, and where the matter of the long and short haul is considered, may have a broader meaning or wider meaning than the same phrase found in section 2. It will be time enough to determine that question when it is presented. For this case it is enough to hold that that phrase, as found in section 2, refers to the matter of carriage, and does not include competition." It was determined in other cases before the court construing section 4 that the term "under substantially similar circumstances and conditions" in the latter section did have a broader meaning, and did include competition as creating dissimilarity of circumstances and conditions. See section 4, *infra*.

The construction of the section in the *Wight Case* prevents a carrier from making a concession to secure a business, which it could not otherwise secure, if that concession makes an inequality in rates between shippers for the same service. Competing shippers in this case were not in fact injured by the concession, as they were compelled to pay for cartage in any event. The only effect was to give the shipper two competing lines at the same rate, and to give the carrier an opportunity to handle traffic from which otherwise it was cut off. While it could have been contended that the circumstances were substantially dissimilar, and that such a discriminative rate for the purpose of securing business was not within the intent of the section, the construction declared in this case makes such a concession un-

lawful, although extended to all "similarly circumstanced," that is, to all making the same shipment.

§ 201 (152). **The party rate case.**—It was ruled by the commission, 1 I. C. C. R. 208, 1 Int. Com. Rep. 611, that under this section reduced land explorers' tickets and settlers' tickets, and special rates to immigrants, 3 I. C. C. R. 652, 2 Int. Com. Rep. 804, were illegal as discriminating under this section. The same ruling was made in the case of party rate tickets, that is, tickets sold at reduced rates and entitling a number of persons to travel together on a single ticket or otherwise, were an unjust discrimination against other passengers and illegal. This ruling however was disapproved by the circuit court, 43 Fed. Rep. 37, and also by the supreme court in what is known as the Party Rate Case, 145 U. S. 263, 36 L. Ed. 703. The latter court said that party rate tickets, which were used principally by theatrical and operatic companies for transportation of their troupes, would hardly fall within the meaning of mileage or excursion or commutation tickets within the exception of section 22, but that did not make the tickets unlawful. The unlawfulness defined by section 2 consisted in an unjust discrimination. It was the object of section 22 to settle beyond all doubt that the discrimination between certain persons therein named should not be deemed unjust; but it did not follow that there might not be other classes of persons in whose favor such discrimination was made without such discrimination being unjust, and that the section was illustrative rather than exclusive. The object of such party rate tickets was to induce more people to travel, and to secure patronage that would not otherwise be secured. After a review of the English cases construing the English act of 1854, the court said that the substance of all those decisions was that the railroad companies were only bound to give the same terms to all persons alike under the same circumstances and conditions, and that any fact that produced change in condition and different circumstances and conditions justifies an inequality of charge.

§ 202 (153). **Wholesale and retail rates in freight traffic.**—In the case of *Hoover v. Pennsylvania Railroad Co.*, *supra*, the court based its ruling upon this Party Rate decision, and applied the principle to a discrimination in favor of manufacturing in-

dustries which would contribute to the business of the railroad. In one of the early cases before the commission, the Providence Coal Company Case, I. C. C. R. 107, 1 Int. Com. Rep. 363, decided in 1887, soon after the organization of the commission, it was held in an opinion by Judge Cooley, that the analogy of wholesale and retail purchasers of merchandise could not be extended to a discrimination in freight rates based solely upon the amount of shipment. The cases were not analogous, since the naming of the quantity of freight which should be compared to wholesale purchasers must necessarily be altogether arbitrary. In this case a discount of ten per cent was allowed on 30,000 tons, and it seemed there was only one dealer who could make that shipment. Judge Cooley added: "A railroad company if allowed to do so might in this way hand over the whole trade along its road to a single dealer, for it might at law make a discount equal to or greater than the ordinary profit in trade, and competition by those who would not get the discount would then be out of the question. The 30,000 ton limit was unreasonable and unlawful because necessarily resulting in unjust discrimination. It was said also that the distinction between carload and less than carload lots was readily understood and appreciated, but that discrimination to be valid must be based on the distinction involved in the cost of handling.

This ruling of the commission, it will be seen, is in harmony with the recent trend of judicial opinion as to the common law right of discrimination; that is, that it must be based upon a difference of the cost of service, and not upon the mere fact of a larger shipment. This was directly ruled in *United States v. Tozer*, 39 Fed. 369, eastern district of Missouri, in a case where the defendant, a railroad agent, was indicted for paying rebates in violation of section 2 of the act. The court, Thayer, J., charged the jury that the fact that the defendants received much more traffic from one shipper than from another did not make the circumstances and conditions under which the two services were rendered substantially dissimilar.

It will be observed however that the discrimination in favor of the larger shipper could in some cases be justified on the ground of a difference in the cost of service, as it is recognized that as a rule the proportionate expense of handling and carriage is

reduced with the increase of quantity. Divested of all considerations of public policy, a carrier might well afford to give a special rate in view of the assurance of a certain quantity for shipment. This was recognized in the *Nicholson v. G. W. R. Co.* case, *supra*. The really controlling consideration is that of *public policy* in this refusal to apply the analogy of wholesale and retail sales to freight rates. It is because the power to discriminate in favor of a larger shipper, whatever the business inducement, is necessarily injurious to business competitors who cannot make such shipments, and therefore tends to monopoly.

§ 203 (154). **Wholesale rates in freight and passenger traffic distinguished.**—There is another ground however for the clear differentiation of discrimination in passenger rates on the basis of the number carried in party rate tickets, from a like discrimination in the case of freight rates. No one is injured or can be injured by the issue of passenger tickets at a reduced rate, whereas in the case of freight rates based upon the amount of shipment, the effect might be to put out of business all but the favored shipper whose business was large enough to ship the requisite amount. This distinction was commented upon by the supreme court in the *Party Rate* case, where the court said at page 280: “If for example the railroad makes the public generally a certain rate of freight and to a particular individual residing in the same town a reduced rate for the same class of goods, this may operate as an undue preference, since it enables the favored party to sell his goods at a lower price than his competitors, and may enable him to obtain a complete monopoly of that business. Then if the same reduced rate be allowed to everyone doing the same amount of business, such discrimination may if carried too far operate unjustly upon the smaller dealers engaged in the same business, and enable the larger ones to drive them out of the market. The same result however does not follow from the sale of tickets for a number of persons at a less rate than for a single passenger; it does not operate to the prejudice of the single passenger, who cannot be said to be injured by the fact that another is enabled at a particular instance to travel at a less rate than he. If it operates unjustly toward any one, it is the rival road which has not adopted corresponding rates; but

as before observed, it was not the design of the act to stifle competition, nor is there any legal injustice in one person's procuring a particular service cheaper than another."

§ 204 (155). Discrimination not unjust when based on special service.—While discrimination based merely on the quantity shipped is not justified, discrimination is proper when it is based on a difference in the cost of handling. In any event however, whatever the basis, the reduced rate must be open to all alike complying with the same conditions, and the rate must be published as provided in section 6. Thus if any accessorial services are rendered by the carrier, such as cartage, the circumstances and conditions are clearly dissimilar. See *Detroit, Grand Haven & Milwaukee Railroad Co. v. Interstate Commerce Commission*, *supra*.

Where a special service is required of the carrier, such as rapid transit and speedy delivery, or refrigeration in transit, a higher rate than for ordinary freight is warranted. If the carrier charging a rate for such special service fails to render it, to the damage of the shipper and without legal excuse, the remedy of the latter is by proper proceeding at law. 5 I. C. C. R. 529, 4 Int. Com. Rep. 205; 4 I. C. C. R. 588, and 3 Int. Com. Rep. 554.

This principle was applied in a case, *Wilson v. Atlantic Coast Line R. Co.*, 129 Fed. Rep. 774, where it was held that a railroad company was not required as a common carrier to take a circus train, a part of which is loaded with wild animals, and transport the same over its line, but it may refuse to transport such train except under special contract limiting its liability from that ordinarily assumed by a common carrier. See also *Chicago, Milwaukee & St. Paul R. Co. v. Wallace*, 66 Fed. 506, 14 C. C. A. 257, 7th Circuit, and 30 L. R. A. 161. In these cases the question was one of the right of the carrier to make special contracts for such special class of freight and to become in effect private carriers thereof. It would follow that the carrier would have a right to make special charges therefor without unjust discrimination.

Thus there was held to be no discrimination in a preferential rate to tank shippers as against barrel shippers, in the transportation of oil. *Penn Refining Co. v. W. N. Y. & P. R. Co.*, 208 U. S. 208, 52 L. Ed. 456, affirming the court of appeals of the

third circuit, 153 Fed. 343. The shippers in this case furnished their own tanks and the carrier had information that the transportation by tank cars was more remunerative to the shipper than the transportation by barrels. The latter shippers had made no demand for tank cars, and could not have used them economically on account of the lack of facilities for unloading. It was held there was no discrimination in charging a rate which was not unreasonable in itself, which was higher for barrels than the tank cars owned by the shippers. See also *Interstate Commerce Commission v. Chicago G. W. R. Co.*, 209 U. S. 108, 52 L. Ed. 705, affirming 141 Fed. 1003, where held that the cost of carriage and risk of injury might excuse a higher rate on live stock than on dressed meats and packing house products.

§ 205 (156). *Carload and less than carload rates.*—The phrase “under similar circumstances and conditions” has always been discussed with reference to the proper *unit* of freight charges, whether carload or less than carload, and of the proper basis for discrimination between carload rates and less than carload rates. It will be seen that on this point the interest of localities is directly involved. Thus the great centres of distribution opposed the differential for the sake of encouraging less than carload shipments to other parts of the country, while shippers at interior points, desiring themselves to distribute to their respective territories, strongly favored a liberal differential between the carload and less than carload rate.

This subject was exhaustively considered in the *Thurber case*, 3 I. C. C. R. 473, 2 Int. Com. Rep. 742. Although it was contended by the western jobbers that the carload rate was the proper and recognized unit, the commission said that it was a sound rule for the carriers to adapt their classification to the laws of trade. If an article moves with sufficient volume and the demands of commerce will be better served, it is reasonable to give it a carload classification and rate. The carload is probably the only practicable unit of quantity, and the fact that an antecedent condition, when no such distinction existed and perhaps was not required, furnish no argument for a return to a condition no longer suited to the requirements of business. It was therefore impracticable and would seriously demoralize classification in business to attempt to restore equal rates for carload and less

than carload shipments in respect of goods properly so classified. It was said however that the public was more largely interested in miscellaneous than in carload shipments of any one kind of traffic, and that differences ranging from forty to one hundred per cent. between the carloads and less than carloads were unreasonable and unjust especially upon articles of general and necessary use, as so great a difference would be destructive of competition between large and small dealers.

While the circumstances and conditions in respect to the work done by the carrier and the revenue earned are dissimilar in the transportation of freights in carloads and less than carloads, and a lower rate on carloads than on less than carloads is therefore not in contravention of the statute, yet the difference between the two rates must be *reasonable*. 9 I. C. C. R. 78.

See also 9 I. C. C. R. 318, where the commission discussed the proper differential between carload and less than carload rates from the middle west to the Pacific coast.

The determination of what commodities are properly allowed carload rates may involve the matter of undue preference against particular kinds of traffic under sec. 3. See 4 I. C. C. R. 212, 3 Int. Com. Rep. 257, *infra*, § 266.

§ 206 (157). Discrimination in application of carload rates. In 9 I. C. C. R. 620, the commission discussed the right of a carrier in according a carload rating to look beyond the transportation itself to the *ownership* of the property transported. The railroad in that case declined to allow a combination of carriages in carload lots at carload rates, and insisted on allowing the carload rate only where the shipment was from one consignor to one consignee, thus denying the right of a forwarding agent shipping the goods of different parties at a carload rate. The commission ruled that there should be no discrimination between consignor and consignee in the allowance of carload rates, when the conditions of the ownership after the property was delivered to the carrier was the same. But no opinion was expressed on the further question whether the carrier could distinguish between a forwarding agent and the actual owner.

In *Lundquist v. Grand Trunk Railway Co.*, 121 Fed. 915, it was held that a carrier could properly distinguish between the forwarding agent and the owner of the property,

and could apply the carload rating when the goods were tendered for shipment by the owner and refuse it when the like traffic was offered by the forwarder. The court said however that it was "a pioneer case, and little aid could be obtained from authoritative sources." A different ruling was made in England as to the English statute, *Great Western Railroad v. Sutton*, L. Rep. 4 H. L. 238, the court holding that like circumstances referred to the carriage of the property and that the carrier could not impose a higher rate when offered by an agent than when offered by the owner. In the *Lundquist* case the court said that the English statute was much more explicit in its terms than the Interstate Commerce Act, in that it provided that all toll should be charged equally to all persons; but even if it were not so, it was not probable that our courts would be called upon to follow the English courts, as the cases were so different. It would seem, however, doubtful whether the employment of a forwarding agent constitutes a difference in the circumstances and conditions warranting discrimination by the carrier.

§ 207. The supreme court on forwarding agents in carload rates.—It was subsequently ruled by the commission both as to express companies (14 I. C. C. R. 422), and as to railroads (14 I. C. C. R. 437), that the carrier could not properly look beyond the transportation to the ownership of the shipment as the basis for determining the applicability of its rates, and that the rules of the official classifications, providing that defendants should collect a greater compensation for car load shipments when made by forwarding agents of different shippers, were unjustly discriminatory and unreasonable. This ruling was disapproved by a majority of the circuit court of the southern district of New York in *Delaware, L. & N. C. Co. v. Interstate Commerce Commission*, 166 Fed. 499, and the enforcement of the order of the commission was enjoined.

The question was definitely determined, however, by the supreme court in support of the ruling of the commission, in 220 U. S. p 235, 55 L. Ed. (April, 1911), where the court reversed the circuit court, and held that the ownership or non-ownership by the shipper of the goods tendered for carriage was not a dissimilar circumstance and condition within the meaning of section 2 of the act, and that a forwarding agent was a person

within the meaning of the act. The court adopted the settled construction of the equality clause of the English Act and held that the circuit court erred in annulling the order of the commission.

§ 208. Discrimination in carload rates.—The right to make carload and less than carload rates carries with it the right of the carrier to fix the minimum rate and charge for the transportation of less than carload shipments on account of the necessary expense and trouble attending the carriage of such shipments, which aside from the actual manual labor involved are practically the same irrespective of the bulk of the package. The question in such cases is whether or not the rate is reasonable and not unjustly discriminative. In 10 I. C. C. R. 412, it was ruled that the minimum charge upon any single shipment of freight should be for one hundred pounds, and that the class or commodity rate of a certain property was not unreasonable or unjustly discriminative in its application to the traffic in question.

§ 209 (158). Cargo rates discriminative.—The principle of the carload as the only practicable unit of quantity was discussed in 7 I. C. C. R. 218, where it was strongly intimated, though not finally decided, that a lower rate made by the carrier on *cargo lots*, being ten thousand bushels of oats and eight thousand bushels of other grains, than on carload lots in export shipments, or in shipments made to the seaboard for export, violated the rule of equality and constituted an unjust discrimination. It was said that this limit of the lower rate would require about ten carloads, and that the effect would be to throw the business into the hands of the large dealers, the margin of profit being very small and the opportunity afforded for the manipulation of prices at seaboard points would be increased.

As to discrimination based on differential in favor of ten carloads of cattle, see 10 I. C. C. R. 327.

Any regulation not justified by the increased cost of service and which tends to discriminate between shippers according to the amount of traffic is unreasonable. Thus making certain charges for the transportation of coal shipped in carloads when the coal is loaded by tipple, that is from platforms and chutes, and exacting a higher charge when it was loaded in some other

way, and for that reason was found in 10 I. C. C. R. 226, not to be justified by a difference in the cost to the carrier, and that the higher rate was discriminatory against the small shippers.

§ 210 (159). Different forms of discrimination.—Any special rate, rebate, drawback or other device whereby discrimination is effected, is prohibited. Thus there may be discrimination in any accessory service charge, as in demurrage, see *Michie v. R. R. Co.*, *supra*, where charge of discrimination was not sustained in the service of cars, 9 I. C. C. R. 207; in the manufacturer's rate on coal, 5 I. C. C. R. 466, 4 Int. Com. Rep. 157; in rebates for the use of live stock or private cars, 4 I. C. C. R. 630, 3 Int. Com. Rep. 502; or in the exaction of unreasonable rent for private cars, 4 I. C. C. R. 131, 3 Int. Com. Rep. 162. All forms of secret rates and drawbacks are prohibited, 1 I. C. C. R. 480, 1 Int. Com. Rep. 764. Discrimination may be effected by unjust classification, 4 I. C. C. R. 535, 3 Int. Com. Rep. 460; or by commissions paid to soliciting agents, 2 I. C. C. R. 513, 2 Int. Com. Rep. 340; also combination rates less than tariff rates are illegal, 2 I. C. C. R. 1, 2 Int. Com. Rep. 1. Any form of discriminating preference is in violation of the statute, 2 I. C. C. R. 90, 2 Int. Com. Rep. 67.

Discrimination violative of this section may be effected through underbilling the weight of freight, or giving it a false classification, whereby less compensation is paid by one person than by another for a like and contemporaneous service. In the report of the commission upon this subject, *supra*, in 1888, it was said that this method of discrimination had been extensively employed, and it reviews the evidence taken by the commission in their investigation. Under the recommendation of the commission, section 10 of the act was amended, imposing penalties upon the shipper who by false classification, false weighing, or false report of weight, or by other devices, knowingly or wilfully obtain transportation of their property at less than the regular rate. See *infra*, section 10. As to discrimination in billing at net weight, see 4 I. C. C. R. 87, 3 Int. Com. Rep. 131; 9 I. C. C. R. 440.

Another form of discrimination is in the use of *private cars*, as where freight cars are either owned by the shipper or a private car line. See *supra*, § 155. The commission says in

its annual report for 1904 that the private car may be of advantage to the carrier by enabling it to provide equipment for special service during limited periods, and the equipment is likely to be more adequate for the public, than for the carrier to undertake to own the cars itself or to secure them from its own connections. Concessions however were made in the use of such charges to particular shippers, which amounted to the payment of a rebate, and when the owner of the car became a dealer in the commodity transported, the fact of ownership gave him an important advantage over his competitor.

A contract of a lumber company with a railroad by which it agreed to build a tie hoist for loading ties on the railroad company cars, and to haul the ties to a certain point for eight dollars and a half a car and return ten per cent.—when the freight was received to apply on the cost of the hoist, the rate given being materially less than the published rate,—this was held by the court of appeals of the fourth circuit to be an illegal discrimination and unenforceable. See *C. & O. R. R. v. Standard Lumber Co.*, 174 Fed. 107, 1909. Though the refusal of an interstate carrier to furnish cars for the shipment of cross ties, while furnishing them to others for interstate shipments to save freight, constituted a discrimination, and that as cross ties were included in the term “lumber,” it would constitute a discrimination for the railroad to place them in another classification, see *American T. T. Co. v. Kansas City Southern*, 175 Fed. 28, in the circuit court of the fifth circuit, 1909.

§ 211. Discrimination in restricted rates.—In 20 I. C. R. R. p. 426, the commission reaffirmed its conference rulings (see rules 34 and 225, conference rulings bulletin No. 4) that railroad tariffs which named rates for the transportation of coal for railroad use more than the rates applicable to the transportation for commercial coal between the same points, was an unjust discrimination and unlawful. It ruled that a tariff providing for reduced rates on coal used for steam purposes, or that the carrier would refund part of the regular carrier charge on the presentation of evidence that the coal was so used, was improper and unlawful, that is to say, that the carrier had no right to attempt to dictate the uses to which commodities transported by it shall be put in order to enjoy a transportation rate. The carriers were, therefore, ordered to desist from maintaining tariffs which

contained rates applicable wholly upon shipments for a particular consignee, or when the commodity transported is for the particular use or rates that are restricted to the use of certain shippers and not open to all shippers alike.

It was also ruled that a carrier may not, as shipper over the lines of another carrier, be given any preference in the application of tariff rates on interstate shipments; but it may lawfully and properly take advantage of legal tariff joint rates applying to a convenient junction or other points in its own line, provided such shipments are consigned through to such points from point of origin and are in good faith sent to such billed destination. In this construction of section 2 the commission cited the Wight case, *supra*, and also the case of Pa. R. R. Co. v. International Coal Mining Company, 173 Fed. 1, where the courts condemned the charging of a higher rate on so-called free coal than on contract coal. See also Mitchell Coal & Coke Co. v. P. R. R. Co., 81 Fed. 403. On this subject see also 11 I. C. C. R. 104; 16 I. C. C. R. 246, 512.

The Commissioner Prouty dissented, agreeing that the rate could not be varied according to the use to which the article is put, but he thought the movement of coal for railroad fuel supply so different from the movement of coal for private use that a different system of rate making could properly be applied to its transportation.

§ 212. Discrimination through industrial tap lines and plant facilities.—The discrimination effected through allowances made by regular carriers to so-called tap lines and plat facilities, whether formally organized as railway corporations or not, has been extensively considered by the commission. Thus in 17 I. C. C. R. 338, the Star Grain & Lumber Co. case, it was ruled that the commission could not recognize as common carriers under the act any of the lines, that did not publish tariffs in ample form, or concur properly in the lawful carriage of other lines, or did not file annual reports and keep their accounts in accordance with the form prescribed by the commission, or that did not in all respects comply with the law. That even if the tap line or industrial line was duly incorporated and complied with the act in these respects, the commission would look to the substance and not to form, in cases where the line was only a facility of a mill or its proprietors. Any allowances or division made to

or with the tap line that was owned or controlled directly or indirectly by the lumber mill, or its officers or proprietors, and beyond the logs that it hauled to the mill had no traffic except such as it might pick up as a mere incident to serve the mill as a plant facility, would be discrimination or a preference and an unlawful departure from published rates. In this case Commissioner Prouty filed a separate opinion, stating that he did not concur in the belief that none of the tap lines were bona fide common carriers, and that many of the tap lines had developed into real common carriers. See also 19 I. C. C. R. 50, and 18 I. C. C. R. 517, where the tap line was constructed and used exclusively for the company owning the timber. The allowances therefore to the company were clearly unlawful.

The principle announced in these cases of so-called tap lines in the lumber districts was applicable to any industrial or plant facility. Thus in 14 I. C. C. R. 237, the commission ruled that a manufacturing plant of the General Electric Company of Schenectady, which enclosed twelve miles of broad guage switching track and seven miles of narrow guage electric switching track, with its own motors and engines, and a force of men, particularly the internal switching, which would be seriously interfered with by the switching of the railroad if permitted access to the plant, was not entitled to compel the railroad to extend its transportation obligations and to accept and deliver cars within the enclosure to meet the requirements of the industry.

The case of the Crane Iron Works at Catasaqua was considered in 15 I. C. C. R. 248 and 17 I. C. C. R. 514, where the company prayed for an allowance of two dollars per car as its share of a through rate on the Philadelphia & Reading Railroad. But the commission ruled that whether the Crane Company was a common carrier or not, the service performed by the railroad was a plant facility and the expenses should be borne entirely by the complainant.

As to what constitutes a common carrier under the act, see *supra*, § 137. A common carrier may be sometimes a plant facility. That is, it may be properly organized and may do business as a common carrier, and yet be in effect a plant facility of its owner. In such case the allowance of any sum in excess of a fair proportion of a through rate would be a discrimination violative of the section.

§ 213 (160). Discrimination through interest in connecting company.—Another device for effecting discrimination is through the making of a joint rate with a connecting railroad controlled by the shipper out of proportion to the value of the service and constituting in effect a rebate to the shipper. This was illustrated in the Hutchinson Salt case, 10 I. C. C. R. 1, where the commission found that the connecting railroad did not own any equipment or rolling stock and was not in any way engaged as a common carrier, and that the granting of the division of the through rate to this connecting company was a mere subterfuge to give a concession in the rate and was an unlawful discrimination. In another salt case involving the transportation of salt westward from points in Michigan, where a similar charge was made as to the alleged interest of the salt producer in a boat line on Lake Michigan, 10 I. C. C. R. 148, the commission found on investigation of the facts that the share of the through rate allowed to the boat line was not so disproportionate as to amount to a rebate, and therefore that the discrimination was not established. Discrimination through the devices of a connecting railroad in the division of joint rates was further discussed by the commission in 10 I. C. C. R. 385, in an opinion filed Nov. 3, 1904, wherein the commission reported the results of investigation of the divisions allowed the terminal lines in and about the city of Chicago. It was found that certain connecting railroads were practically controlled by certain large shippers, and that the amounts allowed as divisions of the through rates were so excessive as to constitute in effect rebates to such shippers, but as no specific charge had been formulated, and the investigation was a general one, no order was made. The commission ruled that to the extent that these divisions exceeded the reasonable charge for the performance of the service, they were an unlawful preference and discrimination in favor of the shipper owning the railroad. On this subject see also the report of the commission for 1904, pages 19 to 23.

§ 214 (161). Discrimination by carrier in favor of itself as a shipper.—A carrier can no more discriminate in favor of itself as producer and shipper than in favor of any other shipper, said Judge Cooley in 4 I. C. C. R. 296, and 3 Int. Com. Rep. 302.

There is a difficulty in determining the fact of discrimination

by a railroad in its own favor as a carrier. Thus in a proceeding against the Delaware, Lackawanna & Western Railroad Company, 3 Int. Com. Rep. 302, and 4 I. C. C. R. 296, *supra*, it appeared that the railroad company kept no separate account between itself as a carrier and itself as a shipper of coal, so that there was no means of determining whether it carried for reduced rates as a carrier, or sustained a loss as a dealer. The commission in that case ruled that it had no power to order such an account to be kept. It could however determine whether the rate charged to the complainant was a reasonable one, and in determining that issue it could determine the price at which the railroad company sold its coal, and the extent of its own profits upon coal marketed compared with the rates charged other dealers for transportation, or whether it made any profit at all, could be inquired into by any tribunal authorized to pass upon the reasonableness of rates. The commission said in the former case, that even if the carrier kept a separate account showing what it charged itself for transportation, and even were such a separate account required, it would not be a safe guide in determining whether the carrier did or did not use its power as a carrier oppressively. See also case in 8 I. C. C. R. 630, another coal case, involving the rates from Myrick, Missouri, and from Rich Hill, the latter being owned by the Missouri Pacific Company. The court held that the only remedy available to the independent operator was to secure a reasonable rate, as the carrier could so adjust its rates that the moving of the coal could be conducted at a loss, the profit being derived from the carriage, and in that event every mine operating must operate at a loss.

In 7 I. C. C. R. 33, the railroad company owned the entire stock of a development company, which had been organized for the purpose of holding certain lands of the railroad company, and caused grain to be purchased in the name of the development company and transported over the lines of the railroad company and sold upon the market. The commission said that even assuming that the development company was an independent entity, and that the nominal freight charges were actually paid by it, still it was merely a tool in the hands of the railroad company and the act accomplished was the act of that company. There was no fixed rate, and the rate actually received was less than was, or would have been, charged any other person for the

same service under the same conditions. Here it was said that this was a clear violation of section 2. The commission in this case distinguished the coal cases above cited, saying that in those cases there was a permanent condition which must be met, while this was an unlawful practice which must be stopped.

In the Chesapeake & Ohio Railroad Company case, *supra*, there was a contract between the railroad company and another railroad for the sale of coal to be transferred over its line at a price less than the aggregate cost of the expense items and its own published freight rates. The court held that this transaction was not a violation of section 2, unless the transaction was a mere device to cover an intentional giving of a less rate for carriage to some than to others, there being no legal ground for assuming that the loss was sustained by it as a carrier rather than as a dealer, and also that if the carrier did not credit on its books its freight accounts with its published rate and did not charge the loss to an account kept with the article dealt in, there would seem to be an apparent violation of the 2nd and 6th sections of the act; but at most only a technical violation, as it had a right to suffer a loss as a dealer. The court could not find any authority for saying that the loss under such a contract must necessarily be treated as a loss on carriage, there being no evidence in the case affecting the good faith of the contract, and therefore nothing whereon to base an inference that the transaction was a device to evade the law. See "commodity clause" in amendment of 1906, § 157, *supra*.

§ 215 (162). Discrimination in storage of goods, etc.—Another form of discrimination condemned by the commission was presented in the complaint of the American Warehousemen's Association, 7 I. C. C. R. 556, which set forth that a large number of railroads unjustly discriminated in offering free storage of freight in various ways to some shippers and not to others, in failing to collect demurrage charges on cars detained by favored shippers, by storing for some concerns large quantities of freight and making delivery thereof in small lots to purchasers, and by assuming expenses of unloading, loading and cartage for some shippers and not for others. A large volume of testimony was taken in different parts of the country. The commission ruled that the system prevailing was open to grave abuses, and that the

allowance of such privileges as storage and the like was clearly forbidden by section 2 of the statute. The effect of allowing special facilities for storage was to provide a favored shipper with branch business houses in large cities. The investigation resulted in a general order requiring carriers to state in their tariffs, what free storage was granted and the terms and conditions under which it would be granted. The commission said that as this procedure had been recommended by the supreme court in the Grand Haven Free Cartage case, it was all the more applicable in the case of storage, which was expressly mentioned in the act. As to right of carrier to contract for storage of through grain in elevators at terminals in transit, see 10 I. C. C. R. 309.

§ 216 (163). Stoppage in transit privileges.—The privilege of milling in transit, that is of stopping in transit, for the purpose of grinding grain into flour or compressing cotton, or sawing logs into lumber, at some point in transit, and then shipping the manufactured or compressed product forward at the through rate, has been discussed in several cases by the commission. See *infra*, § 234. In 8 I. C. C. R. 121, the commission commended the practice in a case of cotton shipment, saying that it benefited both the railroad company and the producer and tended to place non-competitive points upon equality with more distant competitive localities from which lower rates were in force. Such privileges may be granted or withheld by the carrier.

The receiving of cotton from a shipper and having it compressed at a station en route and reshipping to eastern points at the rate equal to the published through rate is not an unlawful discrimination under section 2, when all parties are entitled to the same privilege. *Cowen v. Bond*, 39 Fed. 54 (So. Dist. of Miss.). It is immaterial in such case, that the arrangements are made to induce buyers to believe that the cotton was actually raised in different localities than where it was in fact raised, as the deception could not be imputed to the railroad company. But when the privilege is extended, it must be extended to all in the same conditions and “similarly situated.” See *infra*, section 3.

The mere fact of the payment of a local rate to the manufacturing or compressing point is not material, if there was from

the first an agreement that the property should be entitled to the privilege, and it goes forward from the compressing or manufacturing point upon a through bill from the point of origin to the destination.

Another application of the milling in transit privilege was illustrated in 10 I. C. C. R. 193, in the making of a through rate on lumber with allowance of a proportion of a rate for cost of moving the lumber by a "tap line" from the forest to the mill. The commission ruled that this allowance could only be made to another common carrier, and could not be granted to a shipper as compensation for cost of moving the lumber to the mill.

In *Laurel Cotton Mills v. Gulf & S. I. Railroad Co.*, the supreme court of Mississippi in June, 1904, 37 So. Rep. 134, sustained a right of recovery, that is, it held a petition not demurable under a contract by a railroad with a manufacturer about to erect a cotton mill to give it a milling in transit rate not exceeding certain rates to certain competitive points. The court adopted and followed the opinion of the commission in the lumber tap line case above cited as to the legality of a milling in transit rate.

§ 217 (164). Unjust discrimination through abuse of stoppage in transit privileges.—While the commission has recognized and approved the allowance of through rates in cases of stoppage in transit for purpose of milling wheat into flour and compressing cotton, so as to facilitate the movement of the great staples of the country to market, this privilege has been sought to be applied to cases where there was no manufacture or compressing, but where the effort was to secure a through rate when property was stored for a time at an intermediate point on the through line. Thus shipments of grain were carried to Kansas City from points west thereof at local rates, and afterwards shipped and rebilled from Kansas City to Chicago at the balance of the established through rate from the original point of shipment to Chicago. There was no agreement for the through carriage between the shipper and the carrier at the original point of shipment, but the practice was to allow the consignee or other owner of grain at Kansas City to ship from Kansas City to Chicago and other points at the balance of the through rate

upon presentation of the paid expense bill to Kansas City. The commission ruled that such shipment and re-shipment did not constitute a through shipment from the point of origin to the final point of destination, and that the grain so shipped and re-shipped was not entitled to the benefit of the through rate in force and that the shipment from the point of origin to Kansas City was local, resulting in the grain becoming Kansas City grain, and the fact that it had come from a point further west was no reason for applying on shipments of such grain from Kansas City any less or different rate than was in force from Kansas City. The commission ruled that an indispensable element in every through shipment was the same—a *contract* for such through service, and an agreement between the parties at the inception of the carriage from the point of shipment to the destination at the through rate. 7 I. C. C. R. 240. The same was made in the case of a cattle shipment. 3 I. C. C. R. 450, and 2 Int. Com. Rep. 721.

Any devices therefore for securing a through rate, where the shipment is not in fact a through shipment, and is specifically allowed the milling in transit privilege on facts not justifying the same, would be an unlawful discrimination and violative of this section.

§ 218 (165). Unjust discrimination in passenger service.—Unjust discrimination is prohibited in the transportation of passengers, as well as property. This section however does not prohibit separate cars for the white and colored races, provided cars and accommodations equal in all respects are furnished to both and the same care and protection of passengers observed. 1 I. C. C. R. 428, 1 Int. Com. Rep. 719. See also 1 I. C. C. R. 208, 1 Int. Com. Rep. 611.

When a railroad company makes a reduction from regular passenger fares which are not found unreasonable, it may lawfully require that a person desiring to avail himself of such reduction shall purchase a ticket and that all persons not holding such reduced rate ticket shall pay the reasonable ordinary fare. 10 I. C. C. R. 217. For alleged discrimination in parlor car rates as between through and local passengers not sustained, see 10 I. C. C. R. 221.

The regulation published on regular tariff sheets that the

conductors shall collect twenty-five cents additional fare on trains from passengers without tickets was not an unjust discrimination. 3 I. C. C. R. 512, 2 Int. Com. Rep. 766.

It has been ruled by the commission that commutation rates for school children must be open to all children within the age limit. See 17 I. C. C. R. 144; 12 I. C. C. R. 95. Such rates are not in the nature of charity and, therefore, did not come within the exceptions of the rule in sec. 22.

While a carrier has a wide field of reasonable discretion in passenger service it cannot justify an unreasonable discrimination between localities in refusing to stop its train at a particular place on certain days by a contract not to do so. In 17 I. C. C. R. 396, the stoppage of trains on Sunday at a mountain resort was brought about by the influence of the patrons of the place, and it was ruled, under the circumstances, not unreasonable.

The discrimination involved in the carrying of personal baggage of a passenger without extra charge, is not undue as against a passenger without baggage. The commission said, 17 I. C. C. R. p. 88, that a railroad could properly carry for one charge a passenger and his personal baggage, and could provide a separate car for transportation of baggage, could limit the amount of baggage to be carried free, and make a charge for the excess. The commission did not decide whether 150 pounds was a reasonable limitation of the amount of baggage, or whether the samples of a drummer ought properly to be carried as baggage at all, or whether the excess rates charged were reasonable, as these questions were not presented by the record.

§ 219 (166). Giving passes to shippers prohibited.—A railroad official who gives a pass for interstate transportation as a matter of personal favor, not within any of the exceptions contained in section 22, violates sections 2 and 3 of the act. Charge to Grand Jury (N. Dist. of Cal.), 66 Fed. Rep. 146. One riding on a pass and assuming all risks of accident is bound thereby and cannot recover, and it is immaterial that the pass was issued in violation of the act. *Duncan v. Maine Central R. R. Co.*, 113 Fed. 508.

It has been ruled by the commission that the giving of free transportation to shippers, 7 I. C. C. R. 92, or any free transportation other than that allowed by section 22 of the act is illegal. 2 I. C. C. R. 359 and 2 Int. Com. Rep. 243.

The supreme court has in recent cases sustained the validity of stipulations in railway passes against liability for injuries, where parties accept the passes with knowledge of such conditions. See *Northern Pacific R. Co. v. Adams*, 192 U. S. 440, 48 L. Ed. 513 (1904), and *Boering v. Chesapeake Beach R. Co.* 193 U. S. 442, 48 L. Ed. 742 (1904).

Since the above rulings were made, the giving of passes other than to certain excepted classes is prohibited and made penal both on the part of the railroad and the recipient, see § 156, *supra*.

§ 220. Unjust discrimination in telephone service.—In the first telephone case that was before the commission, 20 I. C. C. R. 614 (1911), it was ruled that contacts between old subscribers and the company, even though valid when made, could not, after congress had undertaken to regulate the rates and practices of telephone companies, be accepted as justifying its charges as between its subscribers similarly situated, such undue discrimination being forbidden by the act. It seems in this case that a few subscribers connected with the new exchange were previously connected with another exchange, which had been abandoned by the defendant company from motives of economy of management and efficiency in service. But the commission ruled that this did not warrant the exaction of the current charges from the new subscribers, while for the same service and facilities the old subscribers continued to pay the lower charges formerly exacted at the old exchange. It seems that there was no difference either in the physical service or in the efficiency of the service, which was rendered by the defendant to the old subscribers at the old exchange and to its new subscribers resident in the same locality who paid the current rates.

§ 221 (167). Application of the section.—This section only deals with the discrimination, which consists of the charging one person with a different compensation, than is charged another for a like and contemporaneous service for the transportation of a like kind of traffic under substantially similar circumstances and conditions. Forms of discrimination which relate to the furnishing of facilities, such as car service and the like, are

prohibited by the more comprehensive language of section 3, *infra*.

The mere fact of the payment of a rebate may not constitute "an unjust discrimination" at common law, or under the statutes, at least prior to the amendment of 1903. Thus it was held in a state case, *Laurel Cotton Mills v. Gulf, etc., Railway Co.*, *supra*, by the supreme court of Mississippi, that if there is no unjust discrimination, an agreement by a carrier that they will carry goods at a certain rate and repay the shipper a part thereof as a rebate after the shipment, is not illegal, and the rebate may be recovered by the shipper in a proper case. But under the publication of rates required under section 6 of the Interstate Commerce Act and especially in view of the provisions of the Elkins Act of February 19, 1903, *infra*, any deviation from the published rate constitutes an offense. If a rebate therefore is paid to one, it must be paid to all under similar circumstances, and the rebate must be a part of the published tariff.

In the Beef Trust case, *Swift v. United States*, *supra*, the bill alleged that the defendants as a part of their unlawful combination for monopolizing the market, were obtaining arrangements with the railroads whereby by means of rebates and other devices they paid less than the lawful rates for transportation. The supreme court said that this did not necessarily charge unlawful acts, as the defendants might severally lawfully obtain less than the lawful rates for transportation, if the circumstances were not substantially dissimilar for which the regular rates were charged, as if they furnished their own cars, for instance, and there were other differences in the service. But as the charge was made in connection with the alleged attempt to monopolize the market in violation of the Anti-Trust Act, the court said that no more powerful instrument of a monopoly could be used than an advantage in the cost of transportation, and that every act done with the intent to produce an unlawful result is unlawful. The charge was therefore held material in connection with the other charges in the bill. See *supra*, § 81.

This section of the statute has no application where the traffic is of different kinds and classes not competitive with

each other. 8 I. C. C. R. 531 and 5 I. C. C. R. 193, 3 Int. Com. Rep. 841. There is no discrimination under this section in the case of impartial action. It must consist in doing for or allowing to one party or place what is denied to the other. 1 I. C. C. R. 401, 1 Int. Com. Rep. 703. *A like kind of traffic* within the meaning of this section does not mean traffic that is identical, but a kind that is capable of a fair and just classification. 4 I. C. C. R. 447, 3 Int. Com. Rep. 417. The section has no application to terminal charges in different cities, 7 I. C. C. R. 513, nor is there any unjust discrimination involved in the refusal to pay mileage to a private car company. 1 I. C. C. R. 132, 1 Int. Com. Rep. 329.

Discriminations based solely upon the business motives of the shipper are illegal. 6 I. C. C. R. 85.

§ 222 (168). Retention of overcharge.—The Interstate Commerce Act does not recognize indefinite or uncertain transportation charges. The idea of unequal compensation for like service, or discrimination in the treatment of persons similarly situated, is repugnant to every requirement of the law, and a party to an interstate shipment cannot be excluded by the carrier from the privileges afforded to other patrons in the same locality because of his refusal to pay excessive freight charges, even though an agreement to subsequently refund the excess should accompany the demand. 6 I. C. C. R. 36. The retention of an overcharge has all the effect of extortion and unjust discrimination, and when the refund of an excessive charge has been unnecessarily delayed for a considerable period, the officials responsible therefor become fairly chargeable with wilful intention to violate the law.

In *Ohio Coal Co. v. Whitcomb*, 123 Fed. 359, circuit court of appeals, 7th circuit, an extra charge of two dollars per car made to one shipper for access to the docks was held under the facts to be discriminative under the Wisconsin statute, and an agreement by the shipper to pay the discriminating charge in order to obtain the service, to which he was legally entitled without such charge, did not estop him from maintaining a suit to recover back the sum so paid.

§ 223 (169). Enforcement of the section.—The section has no application to cases occurring before the act was passed, 1 I.

C. C. R. 144, 1 Int. Com. Rep. 607, that is, so far as the penalties imposed by the other sections of the act for violation of its provisions are concerned. It has been held however that contracts for rebates made before the act went into effect were thereafter incapable of enforcement. *Southern Wire Co. v. St. etc., R. Co.*, 38 Mo. App. 191.

It is no defense to an action for damages for discrimination in rates that the lower rate is charged between the same terminals, because certain shippers had a contract extending over a term of years based on lower rates which were then in force when the contracts were made, while other shippers had no such contacts. See *Pa. R. R. Co. v. International Coal Mining Company*, C. C. A. 3rd Circuit, 173 Fed. p. 1. The court said that it was not necessary for the plaintiff to show that he had paid the freight rate charge under protest. The court said that the measure of damages recoverable in such a case is the difference between the amount paid by plaintiff and the amount it would have paid at the lowest rate charged on any other shipments carried under substantially the same circumstances and conditions during the same time; but the shipper, who has been given rebates, could not maintain an action to recover damages for discrimination because he was not granted larger rebates.

In a suit to recover damages for alleged discrimination, it is sufficient to allege that the defendant had charged plaintiff a given rate for transportation, and for like services under substantially the same circumstances and conditions the defendant had charged another a less given rate, or that plaintiff was charged more than the schedule rate. *Kinnavey v. Terminal Railroad Association*, 81 Fed. 802. In this case it was held by Adams, J., of the eastern district of Missouri, that it was not necessary for the complainant to set out the facts showing that the conditions were similar, but that it was sufficient to allege the ultimate fact in the language of the statute. The payment of an overcharge in such case is not a voluntary payment precluding recovery. *L. & N. Consolidated R. Co. v. Wilson*, 132 Ind. 517 and 18 L. R. A. 105. See also *Murray v. Chicago & Northwestern R. Co.*, 35 C. C. A. 62, 24, 92 Fed. 868, affirming 62 Fed. 24. It was held that an action by a shipper against a carrier for unjust discrimination in the imposition of freight charges paid by plaintiff, lay at common law, regardless of

fraud. In *Wight v. United States*, 167 U. S. 512, 42 L. Ed. 258. the conviction of a railroad agent for violation of this section in granting a rebate, was affirmed.

In *Union Pacific Railway Company v. Goodrich*, 149 U. S. 680, 37 L. Ed. 896 (1893), the supreme court affirmed the judgment rendered in the circuit court under a Colorado statute for an unjust discrimination in intrastate traffic, wherein the damages were measured by the amount of the rebate allowed a competitor. The court said that the plaintiff was entitled to the same terms which the favored company received, and damages to the exact extent to which that company was given the preference.

It constitutes no defense in discrimination between persons that the privilege may be withdrawn at will. *Butchers & Drovers Stockyards Co. v. Railroad Co.*, 14 C. C. A. 290, 1. c. 297, 67 Fed. 35.

As to right to enforce rights of action for violation of this section in courts of law, in view of decisions of the supreme court requiring resort to Interstate Commerce Commission in cases cognizable by the commission, see *infra* sections 8 and 9 of the Act.

As to jurisdiction of equity see opinion of Grosscup, J., in *U. S. v. M. C. R. R.*, 122 Fed. 544 (1903). See also Elkins Act of 1903, *infra*, § 422, as to suits in equity at instance of the government to restrain railroads from discriminations in rates.

§ 224. Connecting carrier not responsible for discrimination by initial carrier.—While a railroad is responsible for the rates on a connecting road, which it operates as part of its own line (*Penn. R. R. Co. v. Interstate Coal Mining Co.*, *supra*), it was held by the supreme court in *Penn. Refining Co. v. Western New York & Penn. R. R.*, *supra*, that a connecting carrier which receives cars from an initial carrier and participates in the through rate which is reasonable in itself, is not liable for a discrimination, alleged to have been made by the initial carrier in favor of shippers by tanks as against shippers by barrels, as the wrong, if any, was chargeable to the initial carrier only.

§ 225 (171). Effect of rebates upon contracts of affreightment.—In *Merchants Cotton Compress Co. v. Insurance Co.*, 151 U. S. 368, 38 L. Ed. 195 (1894), it was held, that there was

nothing in the Interstate Commerce Act which vitiated bills of lading or which by reason of the allowance of rebates actually made would invalidate a contract of affreightment, or exempt the railroad company from liability on its bills of lading. This was a suit of an insurance company which had paid losses claiming to be subrogated against the railroad company on bills of lading issued to the owners and consignees of cotton. It was not shown that the owner or consignee of the cotton had knowledge of the rebate.

§ 226 (171a). **Discrimination in allowance to private transfer companies.**—The railroads operating west from St. Louis made the rate on west bound traffic from East St. Louis the same as from St. Louis, and out of this rate allowed five cents per hundred pounds to transfer companies hauling less than carload lots from East St. Louis to St. Louis. The commission (10 I. C. C. R. 661), without deciding whether the railroads could properly apply the St. Louis rate to the station of a *bona fide* transfer company in East St. Louis and absorb the cost of transfer to St. Louis, nor whether by proper schedule they could allow all shippers from East St. Louis a fixed sum per hundred pounds for transporting their merchandise to the stations in St. Louis, ruled that an allowance from the rate could not be made to a carrier company, which was in effect only a private carrier organized and doing the business of one shipper, as such payment would be in effect a rebate to such shipper.

SECTION 3.

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§ 227 (172). Section 3. Undue or unreasonable preference or advantage forbidden.—Sec. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic in any respect, whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

[Facilities for interchange of traffic.]

Every common carrier subject to the provisions of this act, shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their

[Discrimination between connecting lines forbidden.]

several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business.

§ 228 (173). Origin of the section.—This section has not been amended. It was said by the supreme court in the Import Rate Case, 162 U. S. 197, 1 c. 222, 40 L. Ed. 940 (1896), that it was modeled upon the second section of the English act, for the better regulation of traffic on railways and canals, of July 10, 1854, and the eleventh section of the act of July 21, 1873, entitled “An Act to Make Better Provision for Carrying into Effect the Railway and Canal Act of 1854, and for other purposes connected therewith.” Section 2 of this English act of 1854 is as follows, 17 and 18 Vic. c. 31.

“2. Every railway company, canal company, and railway and canal company, shall, according to their respective powers, afford all reasonable facilities for the receiving, and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats, and other vehicles, and no such company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; and every railway company and canal company, and railway and canal company having or working railways or canals which form part of a continuous line of railway or canal, or railway and canal communication, or which have the terminus, station, or wharf of the one near the terminus, station, or wharf of the other, shall afford all due and reasonable facilities for receiving and forwarding all the traffic arriving by one of such railways or canals by the other, without any unreasonable delay, and without any such preference or advantage, or prejudice or disadvantage, as aforesaid, and so that no obstruction may be afforded to the public desirous of using such railways or canals, or railways and canals as a continuous line of communication, and so that all reasonable accommodations may, by means of the railways and canals of the several companies, be at all times afforded to the public in that behalf.”

Section 11 of the English act of 1873, 36 and 37 Vic. c. 48, re-enacts section 2 of the English act of 1854, and provides specifically for the enforcement of the duty of receiving, forwarding and delivering from and to other companies. For history of this second section of the English act of 1854, see opinion in the case of *L. & Y. Railroad Co. v. Greenwood*, Law Reps.

21 Q. B. D. 215. The equality clause of the Railway Clauses Consolidation Act of 1845 had been construed by the courts to mean equal rates for the carriage of goods over the same portions of the line, and did not apply where the places over which the goods were carried were not the same; and this restricted application led to the more comprehensive provisions of the act of 1854.

It will be seen that section 3 of the act of congress to regulate commerce inserts the word "locality," which does not appear in the English act, so that any undue or unreasonable preference or advantage is prohibited to any particular person, firm, company or corporation or any *locality*, or any particular description of traffic.

The effect of the English cases construing the preference branch of the English act were thus summarized by Judge Jackson in his opinion in the *Party Rate* case in the circuit court, 43 Fed. 37 (1890), (affirmed by the supreme court in 145 U. S. 263, *supra*), quoting from a report of the English Amalgamation Committee of 1872, page 130, as follows:

"The effect of the decisions seems to be that a company is bound to give the same treatment to all persons equally under the same circumstances, but there is nothing to prevent a company, if acting with a view of its own profit, from imposing such conditions as may incidentally have the effect of favoring one class of trade or one town, or one portion of that traffic, providing the conditions are the same to all persons, and are such as lead to the conclusion that they are really imposed for the benefit of the railway company."

It was said by the supreme court in this case, 145 U. S. 263, as to both sections 2 and 3, p. 276: "It is not all discriminations or preferences that fall within the inhibition of the statutes; only such as are unjust and unreasonable. • • • Indeed the possibility of just discrimination and reasonable preferences is recognized by those sections in declaring what shall be deemed unjust."

§ 229 (174). *Relation to sections 1 and 2.*—The first paragraph of the section in its prohibition of any undue or unreasonable preference or advantage to any particular person, company, firm or corporation, or the subjection of any particular person, company, firm or corporation to any undue or unrea-

sonable prejudice or disadvantage in any respect whatever, is comprehensive enough, standing alone, to include the prohibition of discrimination contained in section 2, and such is the judicial construction in England of the term "undue or unreasonable preference or advantage" as used in the English Railway and Canal Traffic Act, from which the terms of this section are taken. *United States v. D. L. & W. R. Co.*, 40 Fed. 101 (1889).

Section 3 is broader than section 2 in that it is not limited to discrimination in rates, but includes any form of unjust discrimination or preference whereby a person, a class of business, a locality, or a kind of traffic is unjustly prejudiced.

That part of the section which forbids a carrier from making or giving any undue or unreasonable preference or advantage to any particular description of traffic, it was said in *U. S. v. B. & O. R. Co.*, 153 Fed. 997 (1907), relates to the property transported, and does not apply to either the method of transportation or the rate charged therefor.

Section 1 prohibits unreasonable rates and the reasonableness of rates can only be determined by the consideration of whether rates are *relatively* reasonable. A rate which subjects a person or community or any kind of traffic to any undue or unreasonable prejudice or disadvantage is in that sense an unreasonable rate. Proceedings before the commission and the courts contesting the rates established by the carriers have usually included sections 1 and 3 and not infrequently sections 1, 2, 3, and 4, the latter when the long and short haul on the same line are involved. Under section 3 however, it is only the relative reasonableness of a rate which is considered, and as cases of individual discriminations in rates have been considered in connection with section 2, the cases grouped under this section will be those relating to discriminations between shippers other than in rates and to alleged preferences to localities and kinds of traffic.

§ 230 (175). **Preferences of localities enforced by competition are not unjust.**—Section 3 has been closely related to section 4 in the judicial discussion of the relation of competition to preferential rates. Section 3 contains the general prohibition of undue or unreasonable preference or advantage to any

locality, while section 4 contains the specific prohibition of any greater rate for a shorter than for a longer distance over the same line. After the decision of the supreme court in the Social Circle case in 1897 (162 U. S. 184), *infra*, section 4, it was ruled by the commission in a proceeding involving the relative rates to Chattanooga and Nashville from the eastern seaboard, 5 I. C. C. R. 546, and 4 Int. Com. Rep. 213, that while the carrier had the right under the law then existing to judge in the first instance, whether it was justified in making the greater charge for the shorter distance under section 4, nevertheless the third section of the act forbidding the making or giving of undue or unreasonable preference or advantage was still applicable, and that where such unjust preference was created, even as a result of railway competition, compelling a lower charge for a longer haul, the carrier should apply for exemption under the proviso of the fourth section. This ruling was sustained in the circuit court and circuit court of appeals, on somewhat different grounds, 39 C. C. A. 413 and 99 Fed. 52, but was reversed in the supreme court, *East Tennessee, etc., R. Co. v. Commission*, 181 U. S. 1, 45 L. Ed. 719, 729 (1901), who said that the effect of this ruling of the commission was to blend the third and fourth sections in such a manner as to necessarily destroy one by the other. The prohibition of the third section was directed against unjust discrimination or undue preferences arising from the voluntary or wrongful act of the carriers complained of, and does not relate to acts the result of conditions wholly beyond the control of such carriers. Where the competition was *controlling*, the preference was not undue or the discrimination unjust. It appeared in this case that there was a margin of profit in the rates in force to Nashville and Memphis. The court said there might be a case where the carrier would not be allowed to avail himself of the competitive condition. Thus if he could not meet the competitive rate without transporting the merchandise at less than the cost of transportation, and therefore bringing about a deficiency which would increase charges upon other business, the engaging in such competitive traffic would both bring about an unjust discrimination and a disregard of the public interest.

The court said that the question whether the charges were reasonable or otherwise, and whether the certain discrimina-

tions were due or undue were questions of *fact* to be passed upon by the commission in the light of all the facts, and the case was directed to be remanded and the proceedings dismissed without prejudice to the rights of the commission to proceed with the further investigation of the facts.

§ 231 (176). **Application of the competition rule.**—The same ruling has been made in several cases in the circuit courts and circuit courts of appeal. Thus in *Commission v. Atlantic Railway Co. et al.*, 35 C. C. A. 217, and 93 Fed. 83, the court said that under the decisions of the supreme court competition was a factor to be considered, and if the competition was real and controlling, it created substantially different circumstances and conditions, and where such lower rate was so induced, if not so low as to be unreasonable and unremunerative to the carrier, it could not afford a basis of undue and unreasonable preferences and advantages in favor of the competitive point within the inhibition of the third section, nor be unjust and unreasonable under the first section of the act. It would seem however that under the rulings of the supreme court even if the competition is controlling, and thus creates substantially different circumstances and conditions justifying the lower rate for the entire haul, and precluding the inference of an unjust preference therefrom, it would still remain for the commission under all the facts to determine whether the established rates were reasonable or not.

See also 10 I. C. C. Rep. 111, where the commission applied the ruling of the court in this case to the reasonableness of rates from New York to Chattanooga and Nashville. In 12 I. C. C. Rep. 68, the commission said that a railroad could not arbitrarily determine that a particular mill shall compete in a certain market with other localities, and that other mills on its line shall not so compete, particularly where the discrimination is not justified by operating conditions. It was also ruled, 13 I. C. C. Rep. 56, that dissimilar circumstances, which justified under section 4 a greater charge for a shorter than a longer haul, will also prevent such rate from constituting an illegal preference or advantage under section 3, and in 13 I. C. C. Rep. 342, that a carrier may in its own interest, if it so desires, carry for a longer distance over its own lines than would be necessary if carried

between the same points over the line of its competitor, in order to obtain a portion of the competitive business, upon terms that will afford some profit. It did not necessarily follow, however, that a carrier in competing for traffic in this way thereby subjects itself to an order compelling it to do so. And in 15 I. C. C. Rep. 11, a carrier with a longer route is not obliged as a matter of law to meet the rate of a short line competitor; and neither is a carrier via any route obliged as a matter of law to reduce its rates because a short line competitor reduces its rate, which has been the same via both routes. And also, 15 I. C. C. Rep. 49, the commission declined to lend sanction to the idea that a lower rate in effect via one line than via another line is conclusive evidence of an unreasonable rate.

§ 232 (177). Whether competition is controlling is a question of fact.—When competition enters into a case as an element, whether or not there is an undue preference or advantage, that is whether the competition is controlling, is a question not of law, but of fact. *Commission v. L. & N. Railroad Co.*, 73 Fed. 409. See also *Brewer v. Central Railroad of Georgia*, 84 Fed. 258; *Commission v. Western A. R. Co.*, 88 Fed. 186; *Commission v. Cincinnati & P. R. Co. et al.*, 124 Fed. 624.

In the latter case, the commission, 9 I. C. C. R. 118, had found that the rates from western cities to Wilmington, N. C., were prejudicial and unduly preferential to Norfolk, Richmond, and other Virginia cities, and it ordered that they should be made upon a basis of 125 per cent of the rates contemporaneously in force from East St. Louis to Norfolk. The court refused to enforce this order, holding that the conditions at Norfolk and Richmond, by reason of the larger number of carrying lines, both rail and water, created a very active competition; and furthermore, the fact that these two cities were in what was known as trunk line territory and Wilmington was in what was known as southern territory, where there were fewer transportation lines and less active competition, resulting in higher rates to Wilmington, although the length of haul was about the same. The commission had refused to recognize the higher preferential rates based upon the location in the southern territory in another case from Wilmington. See 9 I. C. C. R. 17. In the latter case the commission said it was the first case during their fourteen years

experience which showed a through rate charge over connecting roads in excess of the combination charges applying to and from an intermediate point on the through line.

As to the competition rule, see also *Commission v. L. & N. R. Co.*, 46 C. C. A. 685, and 108 Fed. 988, affirmed by the supreme court in 190 U. S. 273 and 47 L. Ed. 1047 (1903).

For application by the commission of the competition rule to alleged preference, see 10 I. C. C. R. 29. Where the preference in rate exceeds the competitive rate, there is as to such excess a case of undue preference under this section. 10 I. C. C. R. 342.

§ 233 (178). Discrimination between domestic and foreign traffic in import and export rates not unjust preference.—An order was made by the commission in March, 1889, requiring that imported traffic transported to any place in the United States from a port of entry or place of reception, whether in this country or in an adjacent foreign country, should be taken on the inland tariff covering other freights.

Later, in June of the same year, in 3 I. C. C. R. 137, and 2 Int. Com. Rep. 553, the commission ruled that in export rates the proper method was to add to the established inland rates from the interior to the seaboard the current ocean rates. The commission ruled that as ocean rates were not subject to the control of the act, they were not proper for consideration in creating a dissimilarity in circumstances and conditions within the meaning of the act. The parties to the Export Rate case complied with the order of the commission, but the import rate ruling was contested by the Texas & Pacific Railroad Company. The commission ruled that the competition of ocean lines or circumstances affecting the movement of foreign commerce before reaching our own country did not constitute a dissimilarity of circumstances and conditions within the meaning of the act. Their ruling was sustained by the circuit court in a proceeding to enforce the order of the commission, 52 Fed. 187, and also by the circuit court of appeals, 6 C. C. A. 653, 57 Fed. 948. The latter court thought that some discrimination in rates might be justified under the circumstances, but that the rates imposed were unreasonable. The supreme court in 162 U.

S. 197, 40 L. Ed. 940 (1896), reversed both courts and directed the dismissal of the bill (Justices Harlan, Brown and Fuller, C. J., dissenting). The court said that the purpose of congress was to facilitate and promote commerce, and not to reinforce the provisions of the tariff laws, and that the effort of the commission to deprive inland consumers of the advantage of through rates seemed to create the mischief which it was one of the objects of the act to remedy, and that among the circumstances and conditions to be considered, as well in the case of traffic originating in foreign ports as in the case of traffic originating within the limits of the United States, was competition at the seaports, and in deciding whether rates and charges, made at a low rate to secure foreign freights which would otherwise go by competitive routes are or are not undue and unjust, the fair interest of the carrier companies and the welfare of the community which is to receive and consume the commodities, are to be considered. The supreme court said that the fact that there was a considerable disparity between other and local rates did not warrant the circuit court of appeals in finding that the disparity constituted an undue discrimination, as no such issue was made before the commission, and the defendant was entitled to have the reasonableness of the rate considered, in the first instance at least, by the commission upon a full consideration of all the circumstances and conditions upon which a legitimate order could be based. Especially was this true when there was no person, firm or corporation claiming that he or they had been aggrieved by the disparity in the rates, the party complaining being the commission itself.

This decision was construed as applying to export rates as well as to import rates. The commission in its report of 1897 said that the carriers insisted that this decision controlled the rates for inland carriage to the seaboard of traffic for export, and recommended that congress amend the act giving the commission power to control inland rates, both import and export, but no such amendment has been enacted.

It is therefore a question of fact whether rates upon export or import traffic as well as those upon domestic traffic are unreasonable and unjustly preferential, but as a matter of law, it is not any violation of the act for the carrier to make a lower

rate to the point of export or from the port of import upon the traffic which is exported or imported than upon that which is locally consumed. See 8 I. C. C. R. 214.

§ 234. Milling in transit and export trade.—In 14 I. C. C. Rep. 356, the commission considered the case of a miller in the city of New York who competed in export business with shippers from the west, and it was ruled that as he was not entitled to a milling in transit privilege, that he should have the same rate upon grain which he subsequently ground into export flour that the carriers accorded to interior mills upon export flour.

The ruling of the commission in this case was affirmed by the circuit court, S. D. of N. Y., three judges concurring, 168 Fed. 131 (1909), which denied a temporary injunction against the enforcement of the ruling. The court said in its opinion that the commission was an administrative tribunal dealing with practical problems, and as long as parties affected by its orders appear and are fully heard, it has power to grant such relief as the facts shown upon the investigation call for, even though such facts may be presented by evidence technically outside of the issues raised by the pleadings, but were germane to the subject matter of the investigation. The commission was therefore empowered, where it found that a discrimination existed against a shipper or commodity to prescribe a relative rate so that the charge should be the same as that for its similar services to other shippers or another similar commodity, instead of fixing an absolute maximum rate, which would enable the carriers to continue the discrimination by reducing the rate to other shippers or on the other commodities.

See comments on this decision by the commission in the annual report of 1909, p. 30.

§ 235 (179). Application of the import rule to intermediate points on the line.—It was ruled by the commission, 8 I. C. C. R. 214, after the decision in the Import Rate case, that in the application of export grain rates the carrier should in no case make the rate from any point to the seaboard less than from any intermediate point on the same line, and that a rate on export flour from Minneapolis which was one and one-half cents less than the domestic rate to the port of export, with no correspond-

ing concessions to intermediate millers, was an unlawful discrimination, and that any line participating in any such lower export rate on flour from Minneapolis must make a corresponding reduction on the same article from all intermediate points. See also 9 I. C. C. R. 534.

As to the publication of rates on export traffic, see *infra*, section 6. See also 8 I. C. C. R. 185, and 8 I. C. C. R. 110. The commission said in the case first cited that the Import Rate decision did not bar the import and export traffic from the purview of the commission, although it did require that conditions abroad as well as at home should be considered, and that the interests of classes, and not a single class, should be taken into account. See 8 I. C. C. R. 304.

§ 236 (180). Competition created by carriers.—In the Nashville and Chattanooga Rate case, *supra*, the circuit court of appeals in an opinion by Judge Taft, l. c. 424, commented upon the fact that the competition at Nashville was between railroads under the same control, the Louisville & Nashville railroad owning the majority of the stock of the Nashville, Chattanooga & St. Louis Railroad Company, and that but for the restriction of normal competition by the Southern Traffic Association the situation of Chattanooga would win for her certainly the same rates as Nashville. The supreme court in its opinion reversing the case, held that the commission and the circuit court and circuit court of appeals had proceeded upon an erroneous construction of the act, in holding that a preference enforced by controlling competition could be unjust, and that the assertion that the road from Chattanooga to Nashville, growing out of the stock ownership, was in effect the Louisville & Nashville, was necessarily antagonistic to the express finding of the commission that the carriers through Chattanooga and Nashville were placed in position where they must meet the competition to Nashville or abandon all traffic to that point. The court said that it could not undertake the duty of weighing the evidence and determine the issues of fact, which the statute required the commission in the first instance to pass upon, and the case was therefore directed to be re-committed to the commission for that purpose.

In *Commission v. Southern Railway Co.*, 117 Fed. 741, the railroad company had acquired the ownership of the only

road which had previously competed for the business to a certain point, but it was held that this could not affect the question whether its rates unjustly discriminated against such point in favor of another point where competition existed, where it affirmatively appeared that the rates to the non-competitive point had not been increased since the purchase of the competing road.

In the later case of *Interstate Commerce Commission v. L. & N. Railroad Co.*, 190 U. S. 273, 1. c. p. 283, 47 L. Ed. 1047 (1903), the supreme court said that if by agreement or combination among carriers it was found that at a particular point, rates were unduly influenced by a suppression of competition, that fact would be proper to consider in determining the question of undue discrimination and the reasonableness *per se* of the rates to such possible competitive points. It must be an actual and not possible competition. See also *infra*, section 4. It therefore is a question of fact to be determined by the commission whether the preference is induced by the competition, and whether competition is forced upon the carrier or whether the preference is effected through an agreement or combination stifling competition. But if the preference is compelled by the competition, then it is not unjust, under section 3, though the rates may still be unreasonable *per se* and on this ground violative of section 1 of the act.

§ 237 (181). The "Basing Point System" not illegal.—The commission in several cases had condemned what had been called the "Basing Point System" prevailing in the south. 4 I. C. C. R. 686, 3 Int. Com. Rep. 482 and 6 I. C. C. R. 342; 6 I. C. C. R. 361; 8 I. C. C. R. 142. This system consisted in basing local rates according to the relative distance of the local points by the distance of such points from the competitive points, the rate being ascertained in each case by adding to the through rate to the basing point, the local rate from that point back to the local point, the result being that the local points were given an advantage resulting from their proximity to the basing point in proportion to the degree of such proximity. The Interstate Commerce Commission on the complaint of a merchant of La Grange, Alabama, made an order upon the railroad to desist from charging upon this basing rate to La Grange based upon its rate to Atlanta,

the basing point. The circuit court sustained the order of the commission. 102 Fed. 709. This judgment was reversed by the circuit court of appeals, 108 Fed. Rep. 988, and the judgment of the latter court was affirmed by the supreme court, *Commission v. L. & N. Railroad Co.*, *supra*. The latter court said that as it was conceded that the rate on the through freight from New Orleans to Atlanta was the result of competition to Atlanta, there was a resulting dissimilarity of circumstances which prevented any unjust preference in the fact of a high charge to LaGrange, and that there was no just cause of complaint in giving to the local stations the advantage resulting from their proximity to Atlanta, the competitive point, as the same result would have followed if the rate had been fixed at Montgomery, the competitive point nearer to New Orleans, and the local rate fixed from thence on.

It was subsequently ruled by the commission (1907), in 12 I. C. C. R. 372, that in a territory where the basing point had been in operation since the advent of railroads, rates to a competing point made by a combination of the through rate to the nearest trade center and the local beyond, need not, under the construction of the fourth section by the supreme court, be reduced to the basis of every neighboring point of like distance, when the other points in the group whose rates are sought have the advantage of water or other competition. This was prior to the amendment of the fourth section by the act of 1910.

§ 238. Basing points not exempt from regulating power of commission.—In *Interstate Commerce Commission v. Chicago R. I. & P. Co.*, 218 U. S. 88, 54 L. Ed. 946 (1910), the supreme court (Justices White, Holmes, and Lurton dissenting) reversed the circuit court of the northern district of Illinois, 171 Fed. 680, which had enjoined the enforcement of an order of the commission reducing the class rates on through freight from the Atlantic seaboard to the Missouri river cities. It was claimed, and a majority of the circuit judges held, that this order was beyond the power of the commission, as it introduced a new system of rate making which had theretofore had the Mississippi river as a basing point; but the supreme court held that on the finding of the commission, which carried with it the presumption of correctness, that the through rates to the Missouri river cities were too high and unreasonable, that the

commission had the power to readjust the rates, although that involved a change in the basing points theretofore established in rate making. The supreme court in this case quoted from the opinion of the commission 14 I. C. C. R. 312.

“We are not impressed with the view that making rates on certain basing lines should be abolished. No system of rate making has been suggested as a substitute for it, except one based upon the postage stamp theory or one based strictly upon mileage. Either of these would create a revolution in transportation affairs and chaos in commercial affairs that had been builded upon the system of rate making now in effect. It must not, however, be assumed that a basing line for rates may be established and be made an impassable barrier for through rates, or that cities or markets located at or upon such basing line have any inviolable possession of or hold upon the right to distribute traffic in or from the territory lying beyond. Development of natural resources, increase in population, growth of manufacturing or producing facilities and increased traffic on railroads, create changed conditions which may warrant changes in rates and in rate adjustments in order to afford just and reasonable opportunity for interchange of traffic between points of production and points of large consumption.”

And the supreme court added:

“It was the sense of the commission, however, that such points could not be immovable forever and fixed forever against power of changing, or that through rates based on such points must be exempt from regulation no matter what their character, or be constituted at the will of the railroads of the sum of local rates or the sum of rates from one basing point to another, however unjust the rates might be.”

The commission has ruled, 18 I. C. C. R. 502, that if the basing point system is adopted, it must be applied alike to all places where real dissimilarity of circumstances or controlling competition does not exist. See also, as to application of system in rate making, 16 I. C. C. R. 20, 56, 182, 134, 254; 7 I. C. C. R. 30, 197, 302.

In this connection see orders of the commission upon application for relief from the long and short haul provision of section 4 and creating zones of traffic as basing points in connection with transcontinental traffic, § 297, *infra*.

§ 239 (182). **Grouping of rates.**—While section 4 of the act prohibits the charging of a greater rate for the shorter distance, there is no prohibition against charging the *same* aggregate rates

on like traffic for the longer distance over the same line in the same direction. There is in the act no requirement of mileage apportionment of rates. The commission in several cases has passed upon the so called "group" or "blanket" rates, that is, the making of the same rates for different points situated on the same line, or on different lines under the same control communicating with a common centre and being the same or approximately the same distance from such centre and possessing substantially the same commercial relations. The principle was applied in 2 I. C. C. R. 540, and 2 Int. Com. Rep. 313, to a large number of mines composing a coal mining district extending across the state of Illinois to points in western Wisconsin, Iowa and Minnesota, the distance by some part of the route being substantially a fair equivalent for the distance from other points and the commercial necessities being substantially the same for all.

In another case the grouping of coal rates at the rate of ninety cents per ton for a distance covering a radius of forty miles around Pittsburgh, Pennsylvania, was sustained. 2 I. C. C. R. 618, 2 Int. Com. Rep. 436. The commission said that actual undue prejudice or damage of which the rate is the cause must result to more favorably situated producers to render a group rate unlawful. In this case the commission cited the practice under the English Railway & Canal Traffic Act of 1854, where it had been held that the grouping of rates was not unlawful, unless as a matter of fact the effect was to produce an undue preference, and noted that the new English act of 1888 had made specific provision for grouping of rates in conformity with the rule which had been acted on by the commissioners and the courts. See also 4 I. C. C. R. 533, and 3 Int. Com. Rep. 460, where groupings of mines in the Lehigh anthracite coal region were held to involve no unreasonable disadvantage.

Thus in 4 I. C. C. R. 417, 3 Int. Com. Rep. 400, it was found that the rates on *wheat* and *wheat flour*, for reasons peculiar to the territory lying west of the Mississippi river and comprising the large portion of Texas, the state of Missouri and a considerable portion of Kansas, were grouped without reference to distance. In 7 I. C. C. R. 92, the subject of grouping of rates was considered in its application to the rates on *milk*, which was fixed at a uniform rate from all interstate shipping

stations along the lines of the New York, Susquehanna & Western Railroad west of the Hudson river to the points of delivery at Weehawken, Hoboken and Jersey City. The commission said, reaffirming 6 I. C. C. R. 131, that the practice of making one rate for the same product over a very large district and thus equalizing the burdens of transportation to the same market was only justified under special and exceptional circumstances. The circumstances in this case were peculiar, in that the furnishing of an extra perishable article like milk in no greater quantity than is required for daily use in a great city was a business which falls naturally to those producers nearest the city who were able to provide the needed supply. The commission found under the facts that a uniform or blanket rate from all stations of the road was an unreasonable preference to the more distant stations, and said there should be at least four divisions, extending respectively forty miles, fifty-two miles, one hundred miles, one hundred and ninety miles and stations beyond one hundred and ninety miles, with rates adjusted to the respective groups according to distance. On this application of the grouping of rates to milk traffic, see 2 I. C. C. R. 272, and 2 Int. Com. Rep. 162.

In 5 I. C. C. R. 478, and 4 Int. Com. Rep. 183, "blanket" or group class rates applying upon the Northern Pacific road for a distance of over five hundred and eighty miles were found relatively unreasonable.

In 7 I. C. C. R. 43, group rates of seventy per cent. on second class articles and forty-four per cent. on third class applying within a distance of two hundred and seventy-one miles from Pritchard, Alabama, to Verona, Mississippi, on shipments over an extreme distance of six hundred and forty miles to East St. Louis, and which in the next two hundred miles fall to thirty per cent. on second class and twenty-two per cent. on the third class, were ruled *prima facie* unreasonable and unjustly discriminative against points within the group which were nearer to East St. Louis, and unfair as to shipments from Verona. The commission said however that there were probably circumstances under which a group rate of this kind might be justifiable, and no order was made pending an opportunity for the defendant to readjust its group scale, or justify the apparent discrimination.

§ 240 (183). **Qualifications in the application of the competition rule.**—The judicial construction of the term “unjust preference” by the elimination therefrom of the preferences compelled by railway competition has very materially affected the enforcement of the third section by the commission. Thus during the first ten years after the enactment of the law, the commission proceeded upon a different theory of the law, and the decisions reported in the first six volumes of the Interstate Commerce Commission Reports, and all of the Interstate Reports, in the construction of this section as well as of section 4, are based upon the theory that the competition of railways subject to the act was not, although it was conceded that water competition was, a justification of a higher rate for the shorter haul and the resulting preference of localities. In 8 I. C. C. R. 107, the commission said that the greater charge for the shorter than for the longer haul over the same line in the same direction had been made in no case which had been presented to them, except where the competition existed at the longer distance points and was set up as the sole excuse for such greater charge.

But under the decisions of the supreme court, the application of the competitive rule is subject to the following qualifications: *First*, the competition must compel the lower rate; that is, the competition must be controlling. The carrier must either reduce its rates or lose the business. *Second*, the competition must not be created by the carrier; that is, the preference must not be affected through an agreement or combination of the carrier with other carriers stifling competition. *Third*, the competitive rate must be at the preferred point remunerative to the carrier. *Fourth*, the rates must be reasonable in themselves.

This reasonableness of rates in themselves must be determined in the light of all the circumstances. The commission has ruled, 9 I. C. C. R. 581, following the decision of Chairman Cooley in 2 I. C. C. R. 231 and 2 Int. Com. Rep. 137, that no rates can be reasonable in themselves within the contemplation of the act which are made regardless of proportion; that rates to be reasonable must be under all the facts and circumstances *relatively* reasonable. In the case cited, the commission ruled that although there was a substantial dissimilarity of circumstances and conditions as between Nashville and intermediate points on the Louisville & Nashville Railroad to

Louisville, so that section 4 of the act did not apply, that a difference of one cent in the rates fully offset this difference in circumstances and conditions, and that any greater difference rendered the rates from the intermediate points relatively unreasonable in violation of sections 1 and 3, although the commission said that it did not feel competent to say that the rates from the intermediate points, independent of the Nashville rate, were absolutely unreasonable in and of themselves.

The commission has considered the claims of unjust preference in the adjustment of rates as between localities in a great variety of cases from all parts of the country. Thus in 8 I. C. C. R. 608, the subject of the transcontinental rates was considered, and it was ruled that the rates from Denver to San Francisco should not be higher than the rates from Missouri river points to San Francisco. It was found however that the rate on sugar might be higher to Denver from San Francisco than to the Missouri river on the ground that the circumstances and conditions governing the traffic were different when it was carried to Missouri river points than when it stopped at Denver, but that there was nothing shown justifying higher intermediate rates on any article west bound.

In 10 I. C. C. R. 460, decided January 17, 1905, the differential between Wichita and Kansas City and other Missouri river points of fifteen cents against Wichita was ruled excessive. In a former case, 6 I. C. C. R. 586, such a differential was held violative of the long and short haul clause, but that decision was rendered before the construction of the clause by the supreme court. As railroad competition existed at Kansas City, a higher charge to Wichita was justified, but the amount of the differential, fifteen cents per one hundred pounds, on sugar in carloads, was ruled unduly preferential under section 3. The rate from New Orleans to Wichita, forty cents per one hundred pounds, was also ruled to be unreasonable *per se*.

In 8 I. C. C. R. 503, the rates from St. Louis, Nashville and Chattanooga, to Hampton and Palatka, in Florida, were ruled prejudicial to the Hampton merchants. That while the competition at Palatka justified a lower rate, the difference should not be greater than the local rate from Palatka to Hampton. In 9 I. C. C. R. 160, rates on sugar from New Orleans to Tifton, Georgia, were ruled unduly prejudicial as compared with

rates to other Georgia points. See also on general subject of undue preference to localities, 8 I. C. C. R. 316, and 8 I. C. C. R. 290.

Where an existing relation of rates is found to be unduly preferential as between localities, the discrimination may be corrected by raising one rate or reducing the other, provided of course, the rate when adjusted is reasonable in itself. See 10 I. C. C. R. 456. In this case it was ruled that the existence of water competition between Buffalo and New York did not justify any wider difference in the rates from Saginaw and Buffalo to points on the New York and Long Branch Railroad than existed in the rates from those shipping points to New York.

These and other cases cited under the different topics of this section will illustrate the almost infinite variety of circumstances bearing upon the complex question of the adjustment of rates between localities.

§ 241 (184). Recognition of natural advantages of localities not an unjust preference.—The commission has repeatedly ruled that a town favorably situated for trade, possessing natural advantages therefor, is entitled to the benefits in rates naturally arising from such location. See 5 I. C. C. R. 571, 4 Int. Com. Rep. 230; 10 I. C. C. R. 148 (the Michigan Salt Case). The law requires the regulation of railroad charges according to the ascertained rights of persons and places, and it is not an agency for the regulation of trade by enabling shippers or communities to do business by putting them on even terms with rivals more remote from competitive territory. 6 I. C. C. R. 458, 8 I. C. C. R. 409. The equal right of a competing locality is neither increased nor diminished by municipal subscriptions advanced for the building of a road. 2 I. C. C. R. 147 and 2 Int. Com. Rep. 95.

The refusal to give a through rate is not an unjust discrimination to a locality when the same rule is applied to all towns and the privilege accorded to none, although the refusal may operate prejudicially to one town and favorably to another, as the discrimination must consist in doing for or allowing to one party or place what is denied to another. 1 I. C. C. R. 401, and 1 Int. Com. Rep. 703.

Neither can a railroad be held to discriminate against a town which it does not reach and in whose carrying trade it does not participate. 5 I. C. C. R. 264, and 4 Int. Com. Rep. 65.

While the commission has conceded that the recognition of natural advantages of localities is not unjustly preferential, yet it has also ruled that the mere fact that one point is larger than another with more business does not justify a discrimination in its favor, 9 I. C. C. R. 42, and that one of the underlying principles of the act was equality between great and small. See also 2 I. C. C. R. 25 and 2 Int. Com. Rep. 32.

§ 242 (185). Competing cities on opposite banks of rivers.—The principle that a city is entitled to the benefits arising from its location, and that when it enjoys exceptional advantages in one respect it should not therefore be subjected to discrimination in other respects, has been applied in the case of cities situated on the banks of rivers, which railroads must cross by expensive bridges for which an arbitrary toll is charged, or which must be allowed for in an apportionment of through rates. Several such instances have been presented to the commission. Thus the cases of Omaha and Council Bluffs, St. Louis and East St. Louis, Cincinnati and Louisville were presented, though in the latter case the cities are situated on the opposite banks of the Ohio river some distance apart, but are competitors for the business of the same territory.

In the case of Cincinnati, 7 I. C. C. R. 180, complaint was made by the Freight Bureau of the Chamber of Commerce against the higher rates charged from Cincinnati than Louisville to southern points. The commission said that the location of Cincinnati upon the north bank of the Ohio river and the fact that the railroads leading south must cross that river by expensive bridge charges justified a higher differential from Cincinnati over rates from Louisville on the south bank of the river. As the commission had nothing before it except the fact of distance, it did not pass any opinion as to whether the existing differentials were just or excessive.

In the case of Omaha and Council Bluffs, 7 I. C. C. R. 386, it was ruled that there was no unjust discrimination against Omaha in the fact that rates to points in Iowa were higher for Omaha than for Council Bluffs by the amount of the bridge toll on an expensive bridge over the Missouri river. It was

said in the opinion that all like or group rates were frequently applied to cities considerably further apart than Omaha and Council Bluffs, but that the usage in this regard was not so uniform and well established as to make their application to those cities even *prima facie* unjust.

In 5 I. C. C. R. 57 and 3 Int. Com. Rep. 701, an East St. Louis miller was ruled entitled to the advantage of his location on the east side of the river as against his competitors on the other side of the river in St. Louis, and a railroad terminating in East St. Louis which allowed St. Louis millers a rebate for the cost of their teams across the bridge to the railroad station was unjustly discriminating against the East St. Louis miller, and the latter was therefore entitled to a reduction of six cents a barrel as to flour handled by him to the station on the rates in force, as long as the railroads bore that amount of the cost of carriage for the St. Louis shippers.

§ 243 (186). Differentials between competitive cities.—The intense competition of modern commerce is illustrated in the complaints made to the commission by the Boards of Trade or other commercial organizations of different cities against alleged discriminations in the relative railroad rates to competing localities. The differentials allowed by the trunk line associations, particularly on the grain traffic from the west to the seaboard, as between the different seaboard cities, have been very exhaustively investigated. Thus in the case of the alleged discriminations against Boston, 1 I. C. C. R. 436 and 1 Int. Com. Rep. 756, the commission ruled in 1888 that the then existing differentials between Boston and New York, being ten cents per hundred pounds on the first and second classes, and five cents per hundred on the four other classes, on traffic from west of Buffalo, were not unreasonable. The conclusion was based upon the greater cost of transportation to Boston, the greater volume of business to and from New York, the competition by water and through lakes and canal and Hudson river to New York, and the geographical and commercial advantages of New York.

Later however in 1892, the commission re-examined the subject and concluded that the differential was excessive and should be made, not by adding an arbitrary sum to the New

York rate, but by adding a percentage, ten per cent, to the New York rate. In this case the commission ruled that the doctrine of estoppel was not applicable, as the commission was not a court, and that the whole spirit and scope of the act made the report and order of the commission in no sense final, except in the sense that the parties may be impressed with the justice of the order and acquiesce therein. 5 I. C. C. R. 166, 3 Int. Com. Rep. 830.

In 1898 the commission, on the complaint of the New York Produce Exchange, investigated the differentials allowed by the railroads of two cents to Philadelphia and three cents to Baltimore below the New York rate on grain, flour and provisions. 7 I. C. C. R. 612. The commission made an exhaustive investigation of the commerce of the three ports, and concluded that the differentials were legitimately based upon the competitive relations of the carriers, and did not result in any unlawful preferences or advantage to Philadelphia or Baltimore over the city of New York. It was contended in this case that the rates were really made by the trunk line associations, but the commission ruled that, so far as the alleged violation of the third section was concerned, this was immaterial.

Still another application was made in 1904, and in an opinion in 11 I. C. C. R. 13, the differentials were again considered, this time relating only to export trade. The commission ordered a reduction of two cents on flour at Baltimore and one cent at Philadelphia, allowing the existing export differentials otherwise to remain in force. Commissioner Clemens dissented, saying that he did not think that competing carriers could lawfully effect through the agency of the commission a restraint of competition in trade between themselves and the ports, when such action on their own part would be unlawful.

On a complaint of the Saginaw Board of Trade (17 I. C. C. R. 128), it was ruled that the proximity of Detroit and Toledo to the great channels of through transportation and their location on direct through routes where the amount of traffic is very great and the general operating and traffic conditions are favorable, are elements that cannot be ignored by the rate maker and must necessarily tend to lower rates than can be accorded to communities that are removed from these great streams of traffic.

Cases of alleged discrimination in relative rates between competing cities have been investigated in different sections of the country. As in the case of alleged unreasonable rates, the conclusions of the commission are not adjudications, and as the commission observed in the case of the Boston differential, they do not preclude the commission itself from reinvestigation. A rate, which is relatively reasonable at one time, may become through changed conditions relatively unreasonable.

§ 244. Preference in demurrage charges.—Undue preference between competing cities, or between competitors in business, may be shown in the allowance of demurrage; that is, in allowing time unreasonably small in one place and unreasonably long in another, 8 I. C. C. Rep. 351. See also 7 I. C. C. Rep. 591. The commission may afford relief from the imposition of demurrage charges upon a showing that the complainant is so subject, either to unjust discrimination or to the payment of unreasonable charges, 13 I. C. C. Rep. 571. After allowing a reasonable time for unloading cars, the carrier may impose such charges for further detention as will afford a speedy relief to its equipment, 16 I. C. C. Rep. 116. Where a railroad extends the time of free delivery at one place, they must treat alike all points similarly situated, see 16 I. C. C. Rep. 497. The commission, however, has no jurisdiction over the question of whether the demurrage charges exacted by the carrier constitute a lawful lien upon the property, 13 I. C. C. Rep. 571. The right of a railroad to exact demurrage charges while the cars are standing on a siding owned and operated by the railroad, which was constructed for the use of complainant, is not affected by the fact that the cars are owned by the complainant.

§ 245. Uniform demurrage rules recommended.—The commission in its 23rd annual report (1909) calls attention, p. 13, to the adoption of a uniform code of car demurrage rules by the National Association of Railway Commissions, an association comprising the membership of all the state railroad commissions of the United States. A report was made to this association showing that the transportation system of the country was very much embarrassed by the undue holding of cars by shippers and receivers of freight. A code of rules was prepared by this asso-

ciation, the most characteristic features of which are the tendency of limiting "free-time" to the actual requirements of the consignor and consignee and the refusal of recognition to rules which are employed as instruments of discrimination. The code thus adopted by the National Association has been endorsed by the Interstate Commerce Commission. The commission says in this report that it has been estimated by competent authority that the general adoption and enforcement of demurrage rules allowing the smallest measure of free time consistent with the needs of the public is equivalent to the addition of 100,000 cars for the country's available car supply. The commission says also "Co-operation between the federal and state railroad commissioners with a view to securing the maximum of transportation efficiency and at the same time assuring equal services to shippers and receivers in all parts of the country, so far as they may be possible, augurs well for the future government regulation."

§ 246. Different forms of undue preference.—It may be stated generally that any form of discrimination between persons or localities in the performance of any of the duties of a carrier, whether such duties are imposed by the common law, or by statute, or by contract, would be violative of this section. Thus the failure to publish through rates to a particular town, while such through rates are established and published to other points on the road, operates as an unlawful discrimination against that town. 9 I. C. C. R. 221.

In any of the so called "accessorial services" which may be rendered by the carrier, there must be no unjust preference of localities or individuals in providing such services. Any injustice resulting from the allowance and non-allowance by the carriers of such privileges and facilities is violative of section 3, as well as of section 2. See 7 I. C. C. R. 556.

The differential between *carload* and *less than carload* rates may be unjustly prejudicial to localities, as well as unjustly discriminative as between individuals. See 9 I. C. C. R. 318, and section 2, *supra*.

Where the circumstances and conditions of the localities are dissimilar, there can be no unjust preference under section 3, as there can be unjust discrimination under section 2. See

Grand Haven Cartage Case, *supra*. Thus it is not an unjust discrimination against a town situated on a branch line to charge it a higher rate than an intermediate point on the through line, even though such intermediate point enjoys the same rate as the terminal point. 5 I. C. C. R. 44 and 3 Int. Com. Rep. 706.

In 4 I. C. C. R. 131 and 3 Int. Com. Rep. 162, the commission ruled that the acquisition and consolidation by a carrier under one system or arrangement of different competing lines of road serving the same territory in the carriage of competitive traffic to the same markets did not allow it to take advantage of the privilege to deprive the public of the benefits of fair competition, nor afford warrant for oppressive discrimination for its own interests, such as equalizing profits of the several divisions; but that its duty to the public required that its service must be alike to all who were situated alike.

A carrier in order to build up and foster industries on its line cannot lawfully refuse to carry the products of like industries located on connecting lines. 15 I. C. C. R. 620; 12 I. C. C. R. 183; 13 I. C. C. R. 460.

It was held in *Foster v. C., C., C. & St. L. R. Co.*, 56 Fed. 434, that the action of a railroad passenger agent guaranteeing that a theatrical troupe to whom he sold a party rate ticket should arrive at its destination in a given time, was not a giving of an undue or unreasonable preference, and the guarantee was held valid and enforceable.

§ 247. Undue preference in allowance for grain elevator service.—The commission in several cases had considered the matter of allowance by the railroads to the owners and operators of elevators. Thus, it ruled, 12 I. C. C. R. 112, that it was an unlawful preference to furnish at certain cities on its line elevator allowance or other free services in connection with the elevation, transfer, mixing, cleaning, clipping, drying, weighing, storage, loading out or shipment of grain which were not at the same time granted or furnished in like or equivalent service or allowance to the same degree of extent at another city on the line.

It was also ruled, 12 I. C. C. R. 85, that a carrier could construct and operate an elevator itself or furnish elevation by arrangement with the owner of an elevator; and the amount of

compensation paid by the carrier, owner, or an elevator rendering this service, was of no concern to shippers or other carriers unless it operated to affect the rates charged by the carrier of the grain traffic or by some device a portion of the allowance is returned by the shipper and thus becomes a rebate; but it was not a rebate when the allowance did not exceed the actual cost.

In the matter of the allowance by the Union Pacific Ry. Co. to Peavey & Co., 14 I. C. C. R. 315, 317, 510, it was ruled that the allowance made to the company for the cost of clearing the commercial benefits growing out of the mixing, treating, storing, weighing, or inspecting of the grain, was an undue preference and unlawful. This latter order was taken into court; and in *Peavey & Co. v. Union Pacific R. Co., et al.*, 176 Fed. 409 (1910), it was held by the judges of the 8th circuit that this order was beyond the power of the commission and was therefore enjoined, as in effect it prohibited all compensation to the owner or operator of the elevator for elevation and transfer in transit. In this opinion the court said that the amendment of 1906 had continued the non-regulation and practice of allowing reasonable compensation for elevation and transfer in transit to shippers who are also owners of elevators; and the clear limitation in that amendment of the power of the commission to the determination of the reasonableness of allowances then made was an implied and effective prohibition of the commission forbidding the allowance to the shippers or owners of reasonable compensation for elevation and transfer in transit of grain through their elevators. The court said further the allowance was not a rebate because it was not a concession from the public schedules, but an allowance in accordance with them.*

The payment of elevator charges was involved in a later case in the circuit court of appeals, 8th circuit, in *Union Pacific R. Co. v. Updyke Grain Co.*, 178 Fed. 223 (April, 1910). The tariffs of the railroad offered compensation for elevation of grain in transit on condition that cars delivered by it loaded to elevators or connecting lines should be returned to it empty within forty-eight hours after their delivery. The rules which governed the switching and disposition of cars provided that foreign cars and cars belonging to the companies, which had a direct connection with the switching territory, should be delivered or sent to their owners, so that the complainants, who were the owners of

* Aff'd (modified), by sup. ct. (Nov. 1911), 32 S. Ct. 22. *Supra*, § 151.

elevators upon railroad tracks other than those of the Union Pacific Company, could not possibly return such cars of that company after they were unloaded, while Peavey & Co., which had an elevator on the tracks of the Union Pacific Company, could deliver such cars back to such company immediately after they were unloaded; and the Union Pacific Company paid it compensation for elevating the grain unloaded from these cars where it refused to pay the complainants any compensation for unloading cars of like character. The court held that this course of proceeding approached an undue prejudice of complainants, who were awarded damages in reparation; but where the delay in the return of the cars was not due to the Union Pacific Company but to the companies having connecting lines, it was held that the complainants were not entitled to any damages. In this case the court said elevation of this nature is a part of transportation which railroad companies are required to furnish on request. They have the legal right either to furnish it themselves or to hire others to provide it. Since they have the right to employ others to provide elevation, they also have the indispensable right to prescribe the terms upon which they will make this employment, provided always those terms are neither unjust nor discriminatory.

In 12 I. C. C. Rep. 85, the commission defined elevation as unloading grain from cars or grain carrying vessels into a grain elevator and unloading it out again after a period not to exceed ten days; that the term as used in the statute, did not include treatment, grading, or cleaning of the grain, and that retention beyond ten days became storage. For discussion of subject of elevation, see 15 I. C. C. R. 90; 15 I. C. C. R. 341; 16 I. C. C. R. 337.

§ 248. Undue preference in wharfage rights.—The jurisdiction of the commission extends to the case of a corporation created to carry on, conformably to a municipal ordinance and confirmatory statute intended to secure public shipping facilities, a wharfage business at a seaport, and to furnish terminal facilities for a railroad and steamship system of which it forms a part, and by which it is controlled through a holding company; and a lease to a shipper of one of the piers and improvements thereon belonging to a terminal company, which relieves him from payment of all wharfage and storage charges other

than such as may be included in the yearly rental, enabling him to acquire practically a monopoly of the export of cotton-seed products, constitutes an unlawful preference under the act to regulate commerce where other shippers are not, and cannot be afforded the facilities on the same conditions. *Southern P. T. Co. v. Interstate Commerce Commission*, 219 U. S. 498, 55 L. Ed. — (1911). This case was distinguished from that of *Louisville & N. R. v. West Coast Naval Stores Co.*, 198 U. S. 483, 49 L. Ed. 1135, where the complainant company was found to have the same privilege of using the wharves of the railroad company as other shippers had. It was also distinguished from the case of *Weems S. B. Co. v. Peoples' S. B. Co.*, 214 U. S. 344, 53 L. Ed. 1024, where there were two independent lines of steamboats one claiming the right to use the wharves of the other on the ground that the wharves had been dedicated to the public and the fact was found adversely to the contention.

§ 249. The management of freight stations and warehouses must be without preference.—The circuit court of Oregon in *U. S. ex rel. v. Oregon R. & N. Co.*, 159 Fed. 975, in 1908, held that while a railroad could grant the privilege to one person to erect a warehouse on its right of way and refuse a like privilege to another, yet that the warehouseman for whom the orders for cars were given, was the agent of the carrier, and the latter was bound to see that the agent was guilty of no negligence or unfaithful performance of duty; and if the rules established by the management of the stations or warehouses operated to prejudice one class of patrons, or if the manner of distributing the cars subjected the storers and exporters to an undue or unreasonable prejudice and disadvantage and favored the warehousemen who were also engaged in the business of buying and exporting, there was a violation of the law.

The hours of business may also involve undue and unreasonable prejudice and disadvantage to shippers. Thus, in 10 I. C. C. R. 378, the commission ruled that such a case, where complaint was made of a closing hour, 4:30, as earlier than that in competing cities, was a matter within their jurisdiction, though the exceptional hour was for the time justified by the congestion of traffic.

§ 250 (189). Unjust preference in car service.—The providing of reasonable car facilities for its patrons is a common law duty of the carrier, and this service must be rendered without unreasonable discrimination either in charges or in the facilities afforded. This common law duty, which is enforced in the different states under state statutes and at common law, is emphasized by and may be enforced under the provisions of this section as to interstate traffic. Localities as well as shippers may be prejudiced by the unjust discriminations in the supply of cars. This right is further enforced by the amendment of 1889, specifically authorizing the issue of a writ of mandamus (*infra*, section 23), for the furnishing of cars and other facilities. In *United States v. West Virginia & Northern Railroad Co.*, 125 Fed. 252, the United States circuit court of West Virginia granted a mandamus to compel the carrier to cease preferences in the supply of cars to certain coal mines. The court said it was the legal duty of the railroad company in furnishing cars to coal mines along its line to distribute the same impartially without unjust discrimination or favoritism, and that such distribution should be based on a disinterested and intelligent examination of the mines, by experts, and upon a consideration of all the factors which go to make up the capacity of the mines, the production, the equipment for the use for handling and loading of the product being secondary because it could quickly and easily be increased to meet the requirements. The distribution of cars was found to have been unduly preferential to certain companies, this conclusion being based upon an estimate of the capacity of the mines and the percentage of cars allotted to each. See also to same effect *United States v. Norfolk & Western R. Co.*, 109 Fed. 831; *infra*, section 23 of act.

It was ruled by the commission, 1 I. C. C. R. 594 and 1 Int. Com. Rep. 787, that it was not a valid excuse for refusal to furnish a fair allotment of cars of a certain class that they could be more profitably employed and could supply the wants of a larger number of shippers on another portion of the line. It also ruled that undue preference of a locality or of a shipper in the car service is established by showing that there is a considerable delay in furnishing cars, while other localities or shippers are furnished with comparative promptness. 9 I. C. C. R.

207. For other cases of discrimination before the commission in providing cars for coal, see 10 I. C. C. R. 226; 10 I. C. C. R. 47. the commission in several cases has awarded reparation in damages for discrimination in car service.

In *Harp v. Choctaw & G. R. Co.*, 61 C. C. A. 405, and 125 Fed. Rep. 445 (eighth circuit), in 1903, it was held in a case where discrimination in car service was claimed in violation of the Arkansas statute, that a carrier transporting large quantities of coal is entitled to make regulations in respect to the manner of receiving and transporting it so that it may be handled safely, expeditiously and economically without interference with the carrier's other business, and regulations which are also designed to promote such business cannot be complained of on the ground that they operate to give a preference to one who complies with them or in a discrimination against one who does not. The furnishing therefore of cars to certain mine owners, who, through agreements with the company, had constructed private spur tracks to their mines, while refusing to furnish cars for loading on the station track to owners who had constructed no spur track, did not constitute an undue preference either under the common law or the Arkansas statute, which prohibited the giving of any preference in the furnishing of cars. The court found that the volume of business was such that to permit the use of the station tracks for loading cars in that manner would not only interfere with the operation of the trains, but also cause serious loss and inconvenience to other shippers and the public. It was held by the state court under the same statute that there was no undue preference between localities when there were not enough cars to supply all. The court cited as the leading case, *Oxlaid v. Northeastern R. Co.*, 15 Common Bench, N. S. 680, construing the English Canal and Traffic Act of 1854, upon which the Interstate Commerce Act was based. *Little Rock & St. L. R. Co. v. Oppenheimer*, 44 L. R. A. 353, 64 Ark. 271.

The commission has ruled that it is not the duty of a carrier to notify the shipper when he can obtain cars for the removal of freight, if by reasonable inquiry he can obtain such information himself. 1 I. C. C. R. 608 and 1 Int. Com. Rep. 778.

It was said by the commission in another case, 1 I. C. C. R. 374 and 1 Int. Com. Rep. 688, where damages were claimed for

alleged violation of the act in the failure to furnish cars for coal shipments, that the inability of a carrier to furnish cars as fast as demanded by shippers was not a violation of the act, where the company had an adequate freight equipment for ordinary conditions, but owing to an extraordinary demand for coal cars due to exceptional conjunction of circumstances, was unable to supply them as fast as the shippers demanded. Under such circumstances, the company performed its duty when it furnished the cars ratably and fairly at the mines along its line in proportion of their freights until the emergency had passed. Neither was a carrier responsible for the detention of cars by shippers longer than was necessary, when it appeared that the company did all in its power to enforce the prompt unloading of the cars. See also as to carriers' duty in the matter of car equipment, 2 I. C. C. Rep. 90, and 2 Int. Com. Rep. 67.

§ 251. The commission's regulations of coal car service sustained.—The complex questions involved in the daily distribution of coal cars in time of car shortage, to coal mines under the peculiar conditions of that industry, are illustrated in the rulings of the commission, 12 I. C. C. Rep. 398; 13 I. C. C. Rep. 440, and 13 I. C. C. Rep. 451. These orders were based upon the peculiar conditions of the industry, which required the disposition of the product as soon as the coal was brought on the surface, as it is impracticable to store the coal, and the production of the mine is therefore dependent upon the quantity that can be removed each day, and the daily distributions of cars are made to the mines to permit their removal of the available output for each day. Unforeseen periods necessarily arise when the shortage of cars to meet the demand takes place notwithstanding the full performance by the carriers of their duty, because of the wide fluctuations of the demand and the detentions of the cars at the terminal points. These conditions have required regulation of the distribution of coal cars. This situation required the handling of four classes of cars: 1. System cars owned by the carriers and in use for the transportation of the coal. 2. Company fuel cars, used for coal for fuel purposes of the carrier. 3. Private cars owned by coal mining companies, or shippers or consumers, and used for the benefit of their owners, and 4. Cars owned by other railroad compa-

nies for the purpose of supplying such other companies with fuel. The commission ordered that in time of car shortage, when the daily distribution was made, that the railroad should count against the mine receiving the same, company fuel cars, foreign railway cars or private cars; and the commission required the railroad to establish regulations for the period of two years from July 1st, 1908, providing for the counting of all such cars. The scope of the order was, however, modified by authorizing the railroad company to deliver to a particular mine the foreign railway fuel cars, the private cars and the company fuel cars consigned to such mine, even though the number might exceed the prorata share of the cars attributable to the mine when ascertained by taking into account all the cars which the order required to be considered. Where, however, the number of such cars was less than the prorata share of the mine, the order only permitted the carrier to add a sufficient number of system cars to make up the rightful prorata number.

The railroad company brought suit to enjoin this order of the commission, and the circuit court (Illinois) held that the railroad was entitled to an injunction restraining the enforcement of the order of the commission, in so far as it directed the taking into account of the cars employed by the railroad in hauling its own fuel. This was on the theory that these cars were not engaged in commerce as commerce. 173 Fed. 930. The supreme court, *Interstate Com. Com. v. Illinois Central Ry. Co.*, 215 U. S. 452, 54 L. Ed. 280 (1910), reversed this decision, holding that this was an administrative order of the commission within the scope of the power delegated by congress; that commerce, in the constitutional sense, included the instrumentalities by which commerce was carried on, and extended to the coal cars owned by the railway company engaged in interstate commerce, wherein it received coal and used it solely for its own fuel purposes; and that the court would not review the discretion of such administrative order of the commission in determining that a certain distribution for a term of two years was fair and reasonable as a means of prohibiting the unjust discrimination forbidden by the act.

The court said that in view of the facts found by the commission as to the preference and discrimination resulted from the failure to count the company fuel cars in the daily distribu-

tion in times of car shortage, and in the far reaching preference and discriminations set forth in the answer of the commission, which were taken as true, as the cause was submitted on bill and answer, the subject was clearly within the sweeping provision of section 3 of the act prohibiting preferences and discriminations, and the order was within the comprehensive powers conferred by the amendatory act of 1906. The divergence and even conflict in the systems of coal car distribution in times of shortage enforced by the different railroad systems illustrated by such cases as *Logan Coal Co. v. Penn. R. Co.*, 154 Fed. 497; *U. S. ex rel. Pitcairn Coal Co. v. B. & O. R. Co.*, 165 Fed. 113, and cases therein cited, and also *Majestic Coal & Coke Co. v. Ill. Cent. R. Co.*, 162 Fed. 810; and divergence of the systems illustrated a complexity of the subject which required and justified the broad discretion imposed in the Interstate Commerce Commission to make the uniform rulings required to prevent preferences and discriminations in the commerce of the country.

Subsequently to this decision of the supreme court in 1910 the system of coal car distribution practiced on the Pennsylvania railroad was condemned by the commission, see 19 I. C. C. R. 356, and the commission adhering to its previous ruling that the owner of private cars was entitled to their exclusive use, and that foreign railway fuel cars assigned to a particular mine could not be delivered to another mine, again ruled that all such cars must be counted against the distributive share of the mine receiving them, and held that the defendant's rule providing that the capacity in tons of such assigned cars should be deducted from the rate capacity of the mine receiving them and that the remainder was to be regarded as the rated capacity of the mine in the distribution of all unassigned cars, was unlawful and discriminatory. The commission said that the law not only gave the shipper a right to an equal or a justly ratable use of the facilities of an interstate carrier, but the assurance that no other shipper shall fare ratably better at the hands of the carrier. The utmost obligation of the carrier under the law was to equip itself with sufficient cars to meet the requirements of a mine for actual shipment. See also 20 I. C. C. R. 52.

In these cases there was a difference of opinion in the commission not only on the power to award damages to a complainant, see *infra*, § 387, but also on the method of rating lines. The

minority contended that the physical capacity of the mine was the only proper basis for car distribution, while the majority adopted the rule of considering not only physical capacity but the commercial output.

§ 252. Discrimination by carrier in its own favor.—As the carrier may not discriminate in favor of itself in violation of section 2 when it is both a carrier and a shipper, so it may not discriminate by the unjust preference in certain localities by the same means, see *supra*, section 2. Such a preference was involved in the matter of coal car distribution considered in the preceding section; and it was upon the ground that the supreme court would not interfere with the administrative order of the commission made for the purpose of securing equality and preventing an undue preference, that the system of car distribution sustained in that case was enforced.

In *Commission v. Chesapeake & Ohio R. R. Co.*, *supra*, a contract by a carrier for the delivery of the coal belonging to the first at a fixed price was held to operate to give the purchaser an undue preference in violation of section 3, and the contract was therefore illegal and unreasonable, and its further performance was enjoined. See *supra*, section 2.

It was held by the supreme court in the *Illinois Central Coal Car Distribution Case*, *supra*, § 251, that a railroad company is not at fault for failure to deliver all the coal cars called for in times of shortage, if the equipment of the coal cars was reasonably adequate to meet all normal conditions, although it became insufficient at times because of extraordinary circumstances against which it was in reason impossible to provide.

§ 253. Undue preference in private cars.—The subject of the use of private cars and their abuse in causing undue preference has been the subject of frequent discussion by the commission, both in its decisions and reports. The act has been amended, see section 1, *supra*, in accordance with the recommendations of the commission, so that the private cars by whomsoever owned, used in transportation and refrigeration, and all the facilities of transportation used in interstate commerce, are under the

control and regulation of the commission. While the owner of the private cars is thus under the control of the commission, the carrier is none the less responsible for all the necessary incidents of transportation and is bound to furnish them to all without discrimination and without undue preference.

In 9 I. C. C. Rep. 1, the commission said that the carrier could refuse to haul private cars at all, or to only haul those of a certain class and refuse to haul others of a little different or substantially different class. In this case the private car was that of a commercial salesman and was stocked with his samples of men's clothing and furnishings. The commission said that in comparison with the private car services rendered for pleasure journeys and theatrical companies, the service was so different and unusual as to justify a greater compensation, or even the refusal of the car altogether.

As to tank cars, which have been the subject of frequent discussion in the decisions of the commission, see 4 I. C. C. Rep. 131, and 3 Int. Com. Rep. 162, the commission said it was the carrier's duty to equip its road with the instrumentalities of carriage suitable to the traffic, and to furnish them alike to all, and its duty to furnish equipment could not be transferred to nor acquired by shippers. Where it accepted and used cars owned by shippers and others, in legal contemplation, it adopted them as its own for the purpose of rates and carriage. The carrier could not by any device, such as the payment of unreasonable rent, avoid the duty of equal charges for equal service. See also 1 I. C. C. Rep. 503, and 1 Int. Com. Rep. 722; 6 I. C. C. Rep. 295.

The carrier, however, has the right to fix its rates according to the cost of the service rendered, as between the transportation in tank cars and barrels. See *Penn. Refining Co. v. W. N. Y. & P. R. Co.*, *supra*.

It was said also by Judge Cooley in an early case, 1 I. C. C. Rep. 503, and 1 Int. Com. Rep. 722, that it is properly the business of the carrier to supply the rolling stock for the freights it offers and purposes to carry, and that if the diversity and peculiarities of traffic are such that this is not practical, the consignors must supply it themselves, and that the carrier must not allow his own deficiencies in this particular to be the means

of competing to the disadvantage of those who make use of the traffic and the facilities it supplies, citing *Railroad Co. v. Pratt*, 22 Wall. 123, 22 L. Ed. 827 (1875).

This subject was discussed by the commission in the *California Fruit Case*, 9 I. C. C. Rep. 182, where it is said that it must be conceded that the leasing of equipment by carriers of refrigerator cars, afforded opportunities for unfair advantage, but that carriers were allowed by the law to procure equipment for business by lease as well as by purchase, and they were not prohibited from leasing from a shipper, nor are they compelled to lease from all shippers because they do from one. As to the reasonableness of charges for private cars and for refrigeration, see § 154 *et seq.*, *supra*; and as to unjust discrimination upon shippers in connection therewith, see § 210, *supra*. See also extended discussion of the subject of private cars by the commission in its annual report for 1904, prior, however, to the amendment of the act, placing such cars under the jurisdiction of the commission.

§ 254. Demurrage and other charges on privately owned cars.—The commission has ruled upon the subject of privately owned cars, 13 I. C. C. Rep. 378, that where the cars are owned by shippers and hired by the carriers on a mileage basis, they are subject to demurrage when such cars stand upon the tracks of the carrier, either at the point of origin or at the point of destination, but are not so subject when upon either the private track of the owner of the car, or the private track of the consignee. The carrier must charge demurrage in all cases where demurrage is imposed by tariff provision upon its own equipment, except where the privately owned car is upon the privately owned siding or track and the carrier is paying or is responsible for no rental or other charge upon such car. The privately owned car, in the sense in which that expression is used, is the car owned by an individual firm or corporation for the transportation of the commodities which they produce or in which they deal.

§ 255. The commerce court on demurrage charges upon private cars.—In *Procter and Gamble Co. v. United States et al.*, the United States commerce court (July 20, 1911) affirmed the

order of the commission dismissing the complaint of the petitioner seeking to set aside the order of the commission which had refused to declare illegal exaction of demurrage charges made by a railroad company against the private cars of the company after they had been delivered to the company and were standing on its private tracks. The court said it was not necessary to decide whether the railroad could refuse or be required to haul private cars. Whatever may be its duty in that regard, such terms can be imposed as a condition of hauling them as have a reasonable relation to the service in which they are employed. The railroads were entitled to require that there should be a reasonably dependent supply and that the cars should not be withdrawn at will to serve the private purposes of the owner, but should be kept in active and steady use, and to that end that they should be on a footing in this respect with other cars. The purpose of the demurrage was to force the cars back into use, and delay was made expensive so that it might be made an object to the shipper which could not afford to disregard. The exaction of demurrage from private cars the same as others was therefore neither arbitrary nor unjust nor violative of the owner's rights.

§ 256 (192). Exclusive use of excursion or sleeping cars of one owner.—The same principle applies in cases of special classes of cars, such as excursion and sleeping cars for passengers. A railroad company may acquire cars of any class, by construction, by purchase, or by contract for their use, and no one can compel a railroad company to select among these several modes or to contract with all carriers. This principle was applied by the commission in 3 I. C. C. R. 577, and 2 Int. Com. Rep. 792, in ruling that it was not unjustly preferential for a railroad company to refuse to haul the excursion cars of one car company, when it had a sufficient supply of excursion cars for its business from other company with whom it had contracted.

§ 257 (193). Leasing of cars does not carry right of exclusive use by owner.—It is the duty of a carrier to equip its road with the means of transportation, and in the absence of exceptional conditions those means must be open impartially to all shippers of like traffic.

The commission said in one of the numerous tank line cases, 5 I. C. C. R. 415, 4 Int. Com. Rep. 162, that ownership of a car rented to a carrier for a full consideration did not of itself entitle the owner to the exclusive use of such car, and if he could stipulate for such use, it must be upon such terms as shall not constitute an unjust discrimination against shippers of like traffic excluded from use of the car. Where a carrier pays mileage for a car which it employs in the service of the shipper, it is the carrier and not the party or company from whom the car is rented who furnished the car to the shipper, and in such case there is no privity of the contract between the car owner and the shipper. 6 I. C. C. R. 295.

§ 258 (194). Stoppage in transit privileges.—The privilege of stoppage in transit, including the right of milling grain in transit or of compressing cotton, which the commission sustained as a legitimate privilege extended by carriers, must not be so extended as to operate as an undue preference to localities or unjust discrimination between individuals. See *supra*, section 2.

The commission said in 9 I. C. C. R. 373, that if stop-over privileges are granted for any purpose, all the facts and circumstances connected therewith should be clearly stated in the published tariff so that the public generally may enjoy the benefits. In this case the grain was shipped through St. Louis with stop-over privilege in East St. Louis for cleaning, sacking, or any other purpose, the shipment afterwards carrying the proportional or balance of through rate from East St. Louis. The commission in this case, however, condemned the practice of shipping to East St. Louis on a local rate for the purpose of "trying the market," and then shipping on a reduced proportional rate to a southern point. See also 7 I. C. C. R. 240, where a similar practice was condemned.

In the lumber "Tap-line" case, 10 I. C. C. R. 193 (*supra*, § 163), the commission said that it might be urged with force that practices of this kind were not sanctioned by the act, and that it had intimated that view in 1 I. C. C. R. 401, 1 Int. Com. Rep. 703. The practice had become so general that vast amounts had been invested in industrial plants upon the faith of the continuance of these privileges; and no doubt their allowance had cheapened the cost of transportation and prob-

ably of manufacture. The commission concluded that when once the principle of milling in transit was admitted it could be applied to the manufacture of logs into lumber. See *supra*, §§ 216, 217.

In 1 I. C. C. R. 401 and 1 Int. Com. Rep. 703, the commission ruled that the privilege of stoppage in transit should not be extended so as to give to the merchants of a town the privilege of shipping their goods from the point of purchase to their own locality, and thence to the place where the goods may be sold by them at the same rate at which they would have been charged if there had been but one shipment from the point of purchase to the point of final delivery.

§ 259. Reconsignment charges.—In the case of Southern Railway Company v. St. Louis Hay & Grain Co., 214 U. S. 297, 53 L. Ed. 1004 (1909), the supreme court reversed the circuit court of appeals of the 7th circuit in 153 Fed. 728, and the circuit court for the eastern district of Illinois, 149 Fed. 649, which had rendered judgment in favor of the company for the amount awarded by the commission and an attorney's fee for an alleged unreasonable and excessive charge for permitting a reconsignment of hay at East St. Louis. The company bought hay and had it shipped to East St. Louis and there unloaded and inspected, and reloaded for southern markets. Taking the reloaded cars therefrom involved the use of the cars for a time, and there was some expense for hauling the cars; and the railroad company charged from four to five dollars a car, equivalent to two cents per hundred pounds. The commission ruled that this was an unreasonable charge and allowed only half the amount, 11 I. C. C. R. 90, and for this the circuit court gave judgment which was affirmed by the court of appeals. The supreme court reversed this judgment and ordered the case remanded to the Commerce Commission for further investigation and report. The court said the railroad was not limited to the actual cost of the privilege; that it had the right to make a reasonable profit. See also 11 I. C. C. R. 486, where the commission dismissed a somewhat similar complaint.

§ 260. Transit privileges.—Where a railroad allows the compression of cotton in transit at the nearest point, the commission

held, 12 I. C. C. R. 312, that it cannot vary that rule so as to give certain shippers the opportunity to avoid it and thereby receive an advantage which is not given to shippers generally.

As to compression of cotton in transit, see also 12 I. C. C. Rep. 312; 13 I. C. C. Rep. 187; and for adjustment of rates on compressed and uncompressed cotton, see 15 I. C. C. Rep. 222; 16 I. C. C. Rep. 131; 17 I. C. C. Rep. 12.

It was argued before the commission that it was without power to direct a carrier to grant a transit privilege. But the commission answered, 16 I. C. C. Rep. 232, that there could be no question as to the right and power of the commission to order the removal of an unjust discrimination and to prescribe such reasonable rates and regulations as would afford such removal; see also 15 I. C. C. Rep. 138.

The same principle was applied in 12 I. C. C. Rep. 210, where it was held that the privilege of stopping hogs in transit, shipped from western points to the east in order that they could be sorted and re-consigned under a through rate from point of origin, could not be enforced against carriers in favor of any specific point or shipper, in the absence of lawfully established tariffs making such privileges open to the public. While the commission has conceded what could be said in favor of milling and manufacturing in transit, it has also commented upon the irregular and discriminatory practices that are invited and possible under the practices. See 16 I. C. C. Rep. 232.

§ 261 (195). Interference by state railroad commission with proportional tariff rates.—The term “proportional tariffs” has been given to freight rates applying upon shipments with stoppage in transit privileges, that is, where the commodities shipped originate beyond the place of shipment, when their ultimate destination is beyond the point to which the proportional rates apply. In a recent Texas case, it appeared that the State Railroad Commission had issued an order that the Chicago, Rock Island & Texas railroad company should cancel all its so-called proportional tariffs on grain products from and to points reached by its railway, whether local or in connection with any other lines of railroad. A bill was filed by the owner of a grain elevator at Fort Worth engaged in the purchase of grain from the country north of Texas for the purpose of shipment by export from the

Gulf ports, alleging that these proportional local tariffs had been filed with the Interstate Commerce Commission and relate wholly to interstate traffic. The court held that the order of the state railroad commission was illegal and void, that it had no jurisdiction or control over the proportional tariff rates in question; and a temporary injunction was issued against the enforcement of the order so far as the commission was concerned; the court declining to grant any injunction against the railroad company, on the ground that it was fully able to respond in damages for any failure to carry out its contract. *Rosenbaum Grain Co. v. C. R. & T. R. Co.*, 130 Fed. 46. The order granting the temporary injunction was affirmed in circuit court of appeals. 130 Fed. Rep. 110.

§ 262 (196). Sidetracks and connections.—Another form ofileged preference has grown out of the practice of building sidings and spurs for connecting the main track of a railroad with industrial enterprises, such as mills, furnaces and elevators.

The amendment of the act in 1906 has given the commission the power, upon the application of a shipper, or a branch railroad, to order the making of a switch connection. As to the rulings of the commission thereunder, see *supra*, § 158.

Some states, as South Dakota (*R. S. So. Dakota*, 1899, section 253), and Nebraska (*Laws of 1887*, Ch. 60), have made a statutory provision for such connections. The statute of the latter state was construed as authorizing the state railroad commission to require the railroad company to grant the right to erect an elevator upon the right of way at a specified point on the same terms and conditions which it had already granted to other persons the right to erect elevators thereat. The supreme court held in *Missouri Pacific Railway Co. v. Nebraska*, 164 U. S. 403, 41 L. Ed. 489 (1896), that this Nebraska statute so construed as requiring a railroad company to grant to the petitioners a right to build and maintain a permanent structure on their right of way was a taking by the state of the private property without the owner's consent for private use, and was violative of due process of law and the fourteenth amendment. The court however limited its decision to this point, and said that the question of the power of the legislature to compel the railroad company to erect and maintain an elevator for the use of the public, or to

compel it to permit all persons to enjoy equal facilities of access from their own lands to its tracks for the purpose of shipping or receiving grain or other freight was not involved, as the order of the commission was not limited to the temporary use of the tracks nor to the conduct of the business of the railway company.

In Illinois, railroads were required by the state constitution, article 13, section 5, to permit connections to be made to their tracks so that any consignee of grain in bulk and any public warehouse, coal bank or coal yard may be reached by the cars on the railroad. In *Chicago, etc., R. Co. v. Suffern*, 129 Ill. 274, it was held that a railroad company was not justified in refusing to ship coal over its own railroad off of a switch road to the shipper's mine simply because the shipper also shipped on another carrier's line.

The question was considered in one of the Louisville Stockyard cases, *Butchers & Drovers Stockyard Co. v. Railroad Co.*, 14 C. C. A. 290, 1. c. p. 297, 67 Fed. 35, whether it was a discrimination which could be controlled or restrained by the courts for a railroad company to refuse to furnish a sidetrack or not to its customers and furnish such accommodations to another similarly situated. The court said in an opinion by Justice Taft that this question was very difficult, both at common law and under the statute. It was held however not to be involved in the case before the court, as there was such a difference between the business of the complainant and that of the other abutters upon the spur track as to make the refusal of the company to grant the sidetrack to the complainant entirely reasonable, this difference consisting of the fact that the complainants' traffic was live stock and that of the other abutters dead freight, making the conditions of deliveries and shipments entirely distinct.

In *Harp v. C. O. & G. R. Co.* (Ark.), 118 Fed. 169, the court held that a railroad was under no obligation to build a spur track to coal mines for private benefit of the owner, nor was it liable for damages for unlawful discrimination because of refusal to build such track, although it had assisted and permitted other spurs to be built. The judgment was affirmed in the circuit court of appeals, but on another ground. 61 C. C. A. 405, 125 Fed. 445.

This decision was approved and followed in *Robinson v. B.*

& O. Railroad Co., 129 Fed. 753, where it was held that the carrier in his right to make reasonable regulations for the delivery of freight was not compelled to receive coal at a siding where merchandise other than coal was received, merely because the place was more acceptable to a shipper, when it had designated the siding for receiving coal and the siding was not an unreasonable place.

In another stockyards case, that of the Interstate Stockyards Co. v. Railroad Company, 99 Fed. 473, the court laid down the general proposition that a "common carrier of interstate freight cannot lawfully deny switch connection and service to one person, place or locality, or kind of traffic, which it affords to others similarly situated." This question however must be construed in connection with the special facts of the case, the alleged discrimination being by a city belt line which was required under the city ordinance and state statute to grant switch connections to all persons and to render service in respect to all freight upon equal and impartial terms. This road was enjoined from discontinuing the receipt of live stock from from sidings which had been theretofore constructed and maintained.

Assuming that there can be no unjust preference in the refusal of switch connections unless the circumstances and conditions are similar, it is difficult to see how in any case the court can compel a carrier to construct and maintain such a siding for private use in its own right of way at its own expense. *Nebraska v. Missouri Pacific Ry. Co., supra.* There seems to be no case where either the commission or the court has enforced the construction and maintenance of such switch connections. See 7 I. C. C. R. 194, where such an application was unsuccessfully made. The carrier is not bound in every instance to furnish under legal compulsion the same terminal facilities for all descriptions of traffic. It is sufficient if reasonable provision is made in this regard, and what is reasonable in a given instance depends largely upon the conditions and surroundings of a particular locality. See 9 I. C. C. R. 61.

§ 263 (197). Undue preference in denying shippers the choice of route.—Another form of undue preference condemned by the commission is the practice of initial carriers in joint con-

tinuous routes of reserving to themselves the exclusive control of the routing of freight, and denying to shippers any choice or control in the selection as between different established routes, the route being determined by the carrier's agents according as they may desire to distribute the shippers' business among one another from time to time or for any reason whatever. The commission ruled in the California Fruit case, 9 I. C. C. R. 182, that this practice was in violation of the statute, subjecting the shippers to undue and unreasonable prejudice and giving the carriers undue and unreasonable preference and advantage. See also 3 I. C. C. R. 658, 3 Int. Com. Rep. 33.

The United States circuit court for the southern district of California, in 123 Fed. 597, and 132 Fed. 829, sustained this view and ordered the enforcement of the order of the commission, and held that the agreement between the carriers constituted a traffic pool, violative of sec. 5 of the act. But this judgment was reversed by the supreme court, *Southern Pacific Co. et al. v. Interstate Commerce Commission*, 200 U. S. 536, 50 L. Ed. 585 (1906). The court said that the rule of the carriers where the right of routing beyond its own terminal was reserved to the initial carrier as a condition for guaranteeing through rates to the shipper, was not violative of sec. 3 or secs. 5 or 6 of the Interstate Commerce Act; that the rule was intended to break up rebating and that there was nothing in the act which prevented the carriers from agreeing upon a routing of the freight.

§ 264 (198). Undue preference in arbitrary division of territory.—Another practice condemned by the commission as violative of the rights of shippers in creating undue preference was the arbitrary division of territory under the agreement of the Southern Railway and Steamship Association, 6 I. C. C. R. 195, whereunder the commission found that the rates on traffic of certain classes were made higher from Chicago and Cincinnati to southern territory than they otherwise would be, for the purpose of securing to the lines from the northeastern cities, transportation of that traffic from the territory set apart to them under the agreement, and that this raised the presumption of the unreasonableness of the rates in such territory. The commission found that this division of territory was without warrant in law and to have been made for the benefit of

carriers without regard to the interests of shippers in the territory, to whom it was in effect a denial of the privilege of shipping their goods to market by the line or route they may prefer. See also 8 I. C. C. R. 185, wherein the commission made a report on the export rates from points east and west of the Mississippi river, and said that it was neither sound in principle or equitable in practice for railroad lines to create artificial differential in the rates, whereby the product of one section is assigned to one market and the product of another section assigned to another market.

§ 265 (199). **Rate wars and undue preferences.**—The relation of rate wars to the reasonableness of rates was considered under section 1, *supra*, § 191, 2 I. C. C. R. 231 and 2 Int. Com. Rep. 137. In the rate war prevailing in the southern freight traffic in June and July, 1894, great disparities in rates were suddenly produced at intermediate points by the large reduction in rates to Knoxville at the commencement of this war. See 6 I. C. C. R. 632. The commission made an inquiry of its own motion. 7 I. C. C. R. 177; see also eighth annual report of the commission, 1894, pp. 20 to 24. The commission held that the maintenance of the usual rates to intervening points during the period of such reduced rates to the terminal points was an unwarranted discrimination and entitled the shippers from intermediate points to reparation for the excess paid by them during such rate war. On the subject of passenger rates and rate wars, see also 2 I. C. C. R. 543 and 2 Int. Com. Rep. 340.

These decisions of the commission were rendered especially in view of the long and short haul requirement of section 4, and prior to the ruling of the supreme court that railroad competition created a dissimilarity of conditions within the meaning of the section. The ruling however of the supreme court that the competitive rate must be remunerative (see *supra*, § 230, would of itself prevent the extreme reductions condemned by the commission.

As to undue preference and discrimination in passenger rates, see *supra*, section 2.

As to applications for injunctions in rate wars by carriers and shippers, see annual report of 1896, page 43.

For account of "rate war" injunctions filed by a competing

carrier, a trust company representing security holders of the carrier, and a complaining shipper during rate war between Seaboard Air Line and the Southern Railway Company in 1896, see annual report of commission for 1896, page 43.

§ 266 (200). Discrimination in kinds of traffic.—The first paragraph of section 3 also prohibits any undue or unreasonable preference or advantage of any particular description of traffic in any respect whatever. It was held in the *Oregon Short Line & U. N. R. Co. v. Northern Pacific Railway Co.*, ninth circuit, 9 C. C. A. 409, 61 Fed. 158 (1894), that this first paragraph of the third section forbidding discriminations against any locality or description of traffic is for the protection of the locality or traffic itself, and cannot be invoked by a carrier against a connecting carrier for alleged discriminations in the matter of requiring prepayment of freight and car mileage. The court said that it was not competent for a railroad company to appropriate the grievances of a citizen or locality under section 3 and complain on account of them.

Goods offered for shipment from a given point must be carried for the established rate from such point, in the absence of a through routing, regardless of the point where the goods originated. *Bigbee Packet Co. v. M. & O. R. Co.* (So. Dist. of Ala.), 60 Fed. 545 (1893); 4 I. C. C. R. 611, 3 Int. Com. Rep. 515.

Discriminations against kinds of traffic have been involved with discrimination against localities where the industries discriminated against are established, and especially when raw material and manufactured products are in any sense competitive. This is illustrated in the litigation resulting from the competition between the packing houses of Chicago and those which have been established in the stockraising section in the west where the industries located in Chicago are directly concerned in keeping down the rates on live stock to that point as compared with the rates on packing house products. See 4 I. C. C. R. 158, also 4 I. C. C. R. 611, 3 I. C. C. R. 515, and 10 I. C. C. R. 428. The commission made an order in this latter case brought on the complaint of Chicago Live Stock Exchange, prohibiting the carrier from charging higher rates for transporting cattle to Chicago from points west than for transporting live stock properties. The circuit court, northern district Illinois, after an exhaustive investigation, declined to enforce this order, 141

Fed. 1003, and the judgment was affirmed by the supreme court in 209 U. S. 108, 52 L. Ed. 705, in 1908. The court held that there was no presumption of wrong arising from a change of rate by a carrier nor was there any universal rule that the rate on raw material should not be higher than on the manufactured product. The cost of carriage and risk of injury might excuse a higher rate on live stock than on dressed meats and packing house products, and the reduction of the freight rates for packing house products did not work an undue and unreasonable preference when it was induced by competition and did not directly injure or influence the shippers of live stock. The court said in this case that the railroads were the private property of their owners, and while from the public character of the work in which they are engaged the public has the right to prescribe rules for securing faithful and efficient service and equality between shippers and communities, in no proper sense is the public a general manager, and it followed that the railroad companies could contract with shippers for a single transportation or for successive transportations, subject though it may be to a change of rates in the manner provided in the act; and in fixing their own rates, the carriers may take into account competition with other carriers, provided only that the competition is genuine and not a pretense. For subsequent, Oct. 1911, case of discrimination against packing house products in favor of live hogs, from Iowa points to the east, see 21 I. C. C. R. 490.

The same alleged discrimination between kinds of traffic and localities wherein the competing industries were located were shown in the complaint of the Missouri and Kansas millers against the differential between wheat and flour, where the discrimination operated in favor of the Texas mills as against the mills of Missouri and Kansas. See *infra*, § 269.

Questions of undue preference of kinds of traffic have been raised by manufacturers in respect to raw material and manufactured product for the protection of their local industries against competition, and also by the manufacturers of and dealers in commodities, which were commercially competitive, as anthracite and bituminous coal, 4 I. C. C. R. 535, 3 Int. Com. Rep. 460. This question of undue preference to particular kinds of traffic was also involved with the subject of carload and less than carload rates, *supra*, § 206. See 3 I. C. C. R. 473, 2 Int. Com. Rep. 742; 5 I. C. C. R. 638, 4 Int. Com. Rep. 285.

§ 267 (201). Preferences against traffic—must involve injury.—Undue preference against traffic must ordinarily be such that *injury* is caused thereby to some party or locality. The commission said in 10 I. C. C. R. 173, one of the Louisville Stockyards cases, with reference to a claim that a refusal to receive carloads of live stock from a connecting carrier, when carloads of dead freight were received, that this involved an undue preference of the dead freight, that this refusal to receive live stock did not in any respect benefit dead freight. If an undue discrimination was found, the carrier might comply with the order by ceasing to deliver dead freight, and if this latter alternative was adopted, complainant would not be benefited and other shippers would be greatly injured. See also *Butchers & Drovers Stockyards Co. v. L. & N. R. Co.*, 14 C. C. A. 290, 67 Fed. 35 (1895).

When manufacturing industries are established in localities it often happens that a slight change in the adjustment of transportation charges as to the raw material and manufactured product or article may be sufficient to close manufacturing plants at some points and increase the output at others located elsewhere.

This was the contention in the Chicago Live Stock case, but the supreme court, *supra*, sec. 266, held that there was no presumption of wrong arising from a change of rate by a carrier, nor was there any universal rule that the rate of the raw material should not be higher than on the manufactured product. It was admitted, however, that as a general rule, the manufactured product carried a higher rate than the raw material.

§ 268 (202). A reasonable regulation of carload weights not preferential.—It was ruled in 7 I. C. C. R. 255, that a rule made by a carrier which had not provided track scales at stations, forbidding shippers to load cars above a specified weight of marked capacity of the car under the so-called penalty of an increased rate on the excess weight, was not unlawful, provided the increase in charges for the excess weight was not unreasonable, and the margin between such maximum and the carriers' minimum of carloads of grain was so wide that shippers could readily comply with both rules. Such rules however must be shown upon the carriers' posted schedule. See

infra, section 6. In this case it was also ruled that rules for minimum carload weights for corn or other grain which varies with the size of cars furnished by the carrier are unreasonable, in that they would inevitably confuse and puzzle shippers and consignees, and subject them to excessive charges resulting from arbitrary weights, and increase the number of overcharge claims and afford many opportunities for discrimination in rates between competing shippers. The commission said therefore that the carrier should enforce a fixed and reasonable minimum carload rate for corn and other grain irrespective of the capacity of the cars furnished by it to shippers.

In another case, 3 I. C. C. R. 241 and 2 Int. Com. Rep. 599, the commission held that a rule was reasonable, which prescribed the minimum weight of a carload of cattle at a certain rate, and then charged by the hundred pounds for any excess of weight over the minimum. The commission said that such a rule was more just and reasonable than the practice of making a carload rate irrespective of weight leaving the shipper to load into the car as many cattle as he pleased and was able to put into it, and the fact that some difficulties were found to exist in the prompt and accurate weighing of the cattle was not a reason for abolishing the new rule, but rather for improving and perfecting it.

§ 269 (203). Differentials between grain and grain products.—This question has been extensively discussed before the commission. The millers located in wheat producing territory strongly insisted, that flour being more easily handled, was entitled to at least an equal rate with wheat. On the other hand, the millers located in Texas out of the wheat producing territory were directly interested in a high differential between wheat and flour, so as to at once secure an adequate supply of wheat and exclude competing flour. It appeared from the testimony in the proceeding instituted before the commission by the millers of Missouri and Kansas that the Texas railroads were in the habit of increasing this differential during harvest time for the benefit of the Texas flour mills. The commission ruled, 4 I. C. C. R. 417, and 3 Int. Com. Rep. 400, that a differential of five cents per hundred pounds, that is, five cents per hundred pounds higher on flour, was warranted by the peculiar conditions, but that a larger differential, such as had been maintained for con-

siderable periods, worked an unjust discrimination and was unlawful.

In 8 I. C. C. R. 304, decided some nine years later, the commission reaffirmed this ruling saying that the advantages were not sufficient to warrant interference with the established differential; and in the same opinion, the differential between corn and corn meal in the same territory was made not to exceed three cents per hundred pounds. This ruling was again reaffirmed in January, 1904. 10 I. C. C. R. 35.

In 11 I. C. C. Rep. 220, a differential on corn meal shipped from Missouri river points to Texas was fixed at a maximum of three cents above the rate on corn in force at the same time. In 16 I. C. C. Rep. 73, the differential on flour was fixed at not more than twelve per cent. of the rate on wheat from Kansas points to Phoenix, Arizona. See also 12 I. C. C. Rep. 258.

In cases from other sections of the country it was held that grain and grain products were presumptively entitled to equal rates. See 8 I. C. C. R. 214, where the commission ruled that an equal rate on wheat and flour in the export trade was presumptively proper, but that in view of all the conditions shown in the investigation, the differential rate for export should not exceed two cents per hundred pounds.

§ 270 (204). The commission not concluded by ruling of state commission.—In the case last cited it was shown that by the state law or by the rulings of state commissions a shipper in Kansas or Missouri of cattle consigned to a point in the state was entitled to load the car at discretion without the charge being increased thereby. But the commission said that while such action of the state authorities had always been treated with respect, it was in no wise conclusive upon the Interstate Commerce Commission in the regulation of interstate commerce, as the commission thought that the action of the carriers in prescribing rates for the transportation of cattle by weight instead of by carload was not in itself illegal and was in accord with the general practice as to the regulation of carrier's charges. The state action therefore could not be allowed to control the matter which was within the federal jurisdiction.

§ 271 (205). Discrimination in mode of shipment.—Undue preference may consist not only in a differential rate, that is,

a difference in rate not warranted by the character of the commodity or any consideration relating to the cost of service, but also in any discrimination in the performance of any of the duties of the carrier, or any accessorial services rendered. This is illustrated in the rulings of the commission upon the subject of the alleged discriminations in the shipment of oil in tanks as against the shipment in barrels. Thus it was ruled in 1 I. C. C. R. 503 and 1 Int. Com. Rep. 722, that when oil is transported in tanks permanently affixed to car bodies, the tank is to be considered as part of the car, and for oil transported therein the charge for transportation should be the same by the hundred pounds, that the carrier charges for transportation between the same points, of barrels filled with like oil and taken in carload lots, and that the carrier was guilty of unjust discrimination if the shipper in barrels was charged a higher rate. See also 2 I. C. C. R. 90, 2 Int. Com. Rep. 67.

In the case last cited, on account of the difference in expense of service a higher rate for the oil in barrels in less than carload lots as compared with oil in carload lots was sustained.

The allowance by a carrier to a shipper of oil in tanks of forty-two gallons or any number of gallons for alleged leakage and waste in the transportation, in the absence of a corresponding allowance to shippers in barrels, was an unjust discrimination and unlawful. 4 I. C. C. R. 131, 3 Int. Com. Rep. 162. There was no objection however to the use of estimated or constructive weights, provided the method of estimating works no inequality in its practical application to competing modes of conveyance.

It is the duty of the carrier to equip its road with the means of transportation, and in the absence of exceptional conditions, those means must be open impartially to all shippers of like traffic. If the carrier transports freight in cars owned by the shipper, it must be upon such terms as shall not constitute an unjust discrimination against shippers of like traffic, who are excluded from the use of such private cars. Where the use of a class of private cars, such as tank cars, is not opened to shippers impartially, but is practically limited to one class of shippers, and the charge for a barrel package in barrel shipments in the absence of a corresponding charge on the tank shipments results in a greater cost for the transportation, it is undue

preference and discrimination. 5 I. C. C. R. 415, 4 Int. Com. Rep. 162. For decision of supreme court as to alleged discrimination between tank and barrel shipments, *supra*, sec. 155.

§ 272 (206). Classification.—The subject of undue preference against kinds of traffic necessarily involved the question of *classification*. The strict apportionment of a cost of service on all classes of commodities equally would be impracticable, for the reason that articles which are bulky and cheap would be unable to bear the burden of transportation, as their value would be confiscated by the cost of transportation for any considerable distance. It is universally recognized therefore that in order that such articles as grain and its products, fuel, lumber and ore can be transported at low rates which they can stand, it is necessary for the carrier to charge upon the other classes of goods, which comprise greater value in smaller compass, a greater proportionate rate. Upon this necessity are based the principle and practice of classification of freight traffic, which have been exhaustively discussed in the reports of the Interstate Commerce Commission. See report of 1888, page 34.

Commodities not classified, are given what is known as commodity rates. Thus salt requires and receives a commodity rate lower than class rates. The commission said in 5 I. C. C. R. 299, 4 Int. Com. Rep. 33, that the carriers should only be limited as to such low rating by the rule that a commodity should not be carried at such unremunerative rates, as will impose burdens upon other articles transported to recoup losses in carrying that commodity.

Under the amendment of 1910, to section one, it is made the duty of all common carriers to establish, observe, and enforce just and reasonable classifications of property with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed and just and reasonable regulations and practices affecting classifications, etc., and every unjust and unreasonable classification is prohibited and declared to be unlawful.

§ 273. Uniform classification recommended.—The commission in its several annual reports, has uniformly and earnestly recommended a uniform classification. Thus, in the eleventh

annual report of 1897, p. 62, it reviewed the subject and its prior recommendations and said that at the time of the adoption of the Interstate Commerce Act of 1886 classifications were nearly as numerous as the railroads and led to endless confusion. Some classifications contained not less than thirty-three classes, and even in later years in some of the southern states there were classifications in use containing as many as twenty-two classes of freight. The subject was complicated by the local interests involved in different parts of the country which it was claimed required distinct classifications. The commission said that many of the complaints before then were based upon discriminations and injustices arising from the different classifications in use in the United States. The evil has been measurably reduced by the growth of "community of interests" among railroads and the consolidations of connecting lines, but the differences and resulting confusion are still very great. The commission has consistently urged upon the railroads of the country their co-operation in the adoption of a uniform classification. See 21st annual report 1907, p. 19, where it repeats its opinion that a single classification was regarded as essential to insure compliance with the law and to promote greater economy in administration and conduct of transportation. The commission conceded that it was a task of great magnitude and that it was evident that the carriers themselves by mutual concessions and through voluntary and harmonious action could accomplish the result better than if congress or some delegated tribunal established a classification for them. The commission said that it was advised that the carriers operating the several classifications in different territories, had created a central committee consisting of persons specially qualified to engage in a highly technical work involved in the unification of classifications. In view of the fact that the control of classifications is expressly delegated to the commission by the recent amendments of the act, it says significantly in the report of 1910: "From the progress of the work as stated it appears that the carriers are making a sincere effort to harmonize as far as possible the conflicting features of the various classifications, but the stimulus of requirement should be applied unless satisfactory results at an early day indicate that the desired uniformity will be brought about by voluntary action."

§ 274 (207). Consultation of carriers in classification not illegal combination.—In the report of 1899, pp. 12 to 20, the commission discussed the question of the advance in freight rates by the carriers using what is known as the official classification, covering the territory lying east of the Mississippi and north of the Ohio and Potomac rivers, and in that connection gives the opinion of the attorney-general of December 30, 1899, to the effect that consultation by the representative railroad men in the committee respecting suggested changes in classification, and subsequent independent action by the respective railroad companies by the adoption of the new classification recommended, in the absence of any testimony of compulsion or combination in adopting a classification, was not in violation of the Anti-Trust law.

§ 275 (208). Undue preference in classification.—Undue preference may be effected by discrimination in classification between commodities which are in fact competitive, where such classification is not based on a difference in the cost of service. The English statute of 1854 was construed as imposing upon the carrier the burden of justifying such discrimination by considerations relating to the cost of carriage. *Oxlade v. N. E. Ry. Co.*, 1 Ry. & Canal Traffic Cases, 73; *Thompson v. London & N. W. Ry. Co.*, 2 Ry. & Canal Traffic Cases, 115. This general principle has been applied by the commission in a variety of cases. Thus, the advance of hay and straw from the 6th to the 5th class on the official classification of January 1, 1900 (see 9 I. C. C. R. 264), was ruled unreasonable and unjust as resulting in unlawful discrimination and prejudice against the localities where such commodities are produced, and against producers, dealers and consumers. As to the governing principles of freight classification, see 6 I. C. C. R. 148 and 4 Int. Com. Rep. 525; 9 I. C. C. R. 78. See also 3 I. C. C. R. 473, 2 Int. Com. Rep. 742.

In 4 I. C. C. R. 212, 3 Int. Com. Rep. 257, it was said that where questions of classification and rates are involved as to one particular article of freight, it is often necessary to examine and consider the classifications and rates upon other articles in which the same calculations in respect to value, bulk and expense of handling and carriage would to a considerable extent enter. For the purpose of such comparison it is not in-

dispensably necessary that the articles should be competitive, though if they are competitive, then this feature is held partly to be considered. The proper method of determining the justice of classification by comparison, is with classification created by the carrier for analogous articles. 5 I. C. C. R. 638, 4 Int. Com. Rep. 285. The fact that different rates and classifications are in force in different sections of the country would not of itself warrant an extension of the lower rate of classification to the higher rate and classification as applied. There must be proof of unlawful discrimination or disadvantage or unreasonably higher rates to procure an order directing different rates and classification. 6 I. C. C. R. 61.

In 6 I. C. C. R. 85, a commodity (i. e. not classified) rate published for intending settlers only, but in fact given to shippers indiscriminately was condemned by the commission as calculated to mislead the public and afford an opportunity for favoritism.

For illustrations of the rulings of the commission in cases in classification, see 2 I. C. C. R. 1, 2 Int. Com. Rep. 1, where classification of dried fruit and raisins in two different classes was ruled unreasonable.

Hub blocks were classed with lumber, instead of with unfinished wagon materials. 2 I. C. C. R. 122, 2 Int. Com. Rep. 81.

In 1 I. C. C. R. 393, 1 Int. Com. Rep. 685, railroad ties were classed with other rough lumber.

In 2 I. C. C. R. 573, 2 Int. Com. Rep. 403, Hostetter's Stomach Bitters were ruled not properly classified in the first class with other liquids similar in character. In 4 I. C. C. R. 32, 3 Int. Com. Rep. 74, patent medicines were ruled properly classed at a higher rate than ale, beer and mineral water

In 4 I. C. C. R. 41, 3 Int. Com. Rep. 77, toilet soap was ruled properly classed higher than laundry soap, the commission holding that manufacturer's description of his production for commercial purposes warranted a classification accordingly. See also 4 I. C. C. R. 733, 3 Int. Com. Rep. 564.

5 I. C. C. R. 663, 4 Int. Com. Rep. 318, ruled that celery was properly classified with vegetables rather than with fruits. In 6 I. C. C. R. 148, in view of the great reduction in value of window shades, the classification as first class was held unreasonable. The United States circuit court, in 64 Fed. 724 (1894), declined to enforce this order on the ground that it applied to

shades having a very high value as well as to the cheaper varieties, and the order was amended accordingly. 6 I. C. C. R. 548.

In 7 I. C. C. R. 40, open-end envelopes were ruled properly classed with merchandise envelopes.

In 8 I. C. C. R. 368, iron pipe and fittings packed in cases were ruled properly classed higher than iron pipe and fittings packed in barrels. 6 I. C. C. C. 61, ruled that there were conditions compelling a low rate upon flour which did not apply in the transportation of cereal products.

In 4 I. C. C. R. 212, 3 Int. Com. Rep. 257, the principles of classification were discussed, and applied in the case of surgical chairs. In 10 I. C. C. R. 281, cow-peas were ruled properly classed with grain, and not with fertilizers.

In 12 I. C. C. Rep. 216, the commission said that classification must be based upon a real distinction from a transportation standpoint, and could not depend upon the uses of the commodity after reaching the destination. If the matter was considered from any other than a transportation standpoint, it would lead to an almost endless multiplication of rates. Thus it was ruled in 13 I. C. C. Rep. 109, that the inclusion of wire brushes and brooms not toilet in cases of less than carloads, in the first class, was unreasonable, and they were ordered classified in the third class; while the inclusion of new and old automobiles in the same class was found in 15 I. C. C. Rep. 27, not to be unjust, as no convenient line could be drawn between old and new machines of different values in transportation.

In 21 I. C. C. R. 518, classification of earthen crucibles at third class in less than carloads and fourth class in carloads, was held unjust and discriminatory.

§ 276 (209). Power of the commission in correcting classification.—The commission has in a number of cases exercised the power to order a change in the classification, as in the cases before cited; also in 1 I. C. C. R. 393, 1 Int. Com. Rep. 685; 2 I. C. C. R. 122, 2 Int. Com. Rep. 81; 4 I. C. C. R. 312, 3 Int. Com. Rep. 257; 6 I. C. C. R. 148, 4 Int. Com. Rep. 525.

Assurance made by a carrier that if one will locate in business on the line of his road his property shall be taken for transportation as belonging to a specified class, it was ruled by the commission in 2 I. C. C. R. 122, 2 Int. Com. Rep. 81, could not bind the carrier so as to compel a classification accordingly.

There can be no contract right to a special classification, as the law requires uniformity and impartiality in the dealings of the carrier with all persons.

The subject of classification was considered by the supreme court in *C. H. & B. R. Co. v. Interstate Com. Com'n*, 206 U. S. 142, 51 L. Ed. 995 (1907), affirming 146 Fed. 559.

The court in this case sustained the order of the commission, directing the carrier to cease from further charging the freight rate for common soap in less than carload lots operating throughout official classification territory, increasing the classification from fourth to third class, which was found to have brought about a general disturbance in relations previously existing in the territory, and creating discriminations and preferences among manufacturers and shippers of the commodity and between localities in such territory. The court said that the findings of the commission, that a classification of freight rates produced preferences and discriminations would not be interfered with on appeal, when concurred in by a federal circuit court, unless the record established that clear and unmistakable error had been committed. For the order of commission, see 9 I. C. C. R. 440.

§ 277 (210). Reasonable regulations in classifications.—The commission has ruled, 6 I. C. C. R. 61, that the fact that different rates and classifications are in force in different sections of the country would not itself warrant an extension of the lower rate and classification to the section where a higher rate and classification were applied. There must be proof of unlawful discrimination or disadvantage or of unreasonable higher rates to justify directing an order for changes in the classification. In this case it was ruled that a mixed carload rate for cereal products or for cereal products and flour, that would have the effect of throwing out of the trade many competitors of complainant, or the manufacture only of certain kinds of cereal products and of centralizing the business in the hands of one or more of the dealers, should not be curtailed, when without it no wrong is done to any one and the market is open to all competitors. The commission said therefore that to obtain the abrogation of a rule in classification denying a mixed carload rate upon specific articles, the rule should be shown to be unreasonable, unfair or unjustly discriminative.

It was ruled in 20 I. C. C. R. 546, that the classification of an article of commerce should be stated in terms that the shipping public may readily understand. Tariffs are to be construed according to their language, and the intention of the framers and the practices of the carriers do not control. See 16 I. C. C. R. 431. In 20 I. C. C. R. 489, it was ruled that the classification rule applying minimum weights on shipments of merchandise, and more particularly by millinery packing in ordinary pasteboard or strawboard boxes, that the rule was not unreasonable which provided for the refusal of such shipments when not crated. But in the same case, a classification rule applying minimum weights on shipments in corrugated paper or pulp cartons of certain sizes when uncrated, instead of assessing charges on the basis of their actual weights, was found unreasonable.

§ 278 (211). Facilities for interchange of traffic.—The second paragraph of the third section, though based in part upon the English statute, is materially different therefrom, and the difference has been construed as substantial. Thus the English statute was construed as empowering the court to compel through routing of passengers or freight. The commission held in an early case, 1 I. C. C. R. 86, 1 Int. Com. Rep. 357, that this section of the act did not compel one railway company to sell through passenger tickets over the road of another company. In the Kentucky and Indiana Bridge case, decided in 1890, which was really the pioneer case in the construction of the act, 37 Fed. 567, Jackson, J., said that the commission was not vested with authority to establish through routes nor to fix through rates between connecting lines.

It has since been definitely determined by the repeated decisions of the courts that there is no authority in the commission or in the courts under the act to compel either the routing of passengers or freight, and that the requirement of this section for the affording of all reasonable and proper facilities for the interchange of traffic and the receiving, forwarding and delivery of passengers and property does not mean the receipt and delivery of cars or their through routing of any kind, but only the receipt and delivery of freight and passengers at connecting points without discrimination. This had

been the construction given by the supreme court to the constitution and statute of Colorado prior to the enactment of the Interstate Commerce Act (*A. T. & S. F. R. Co. v. Denver & N. O. R. Co.*, 110 U. S. 667, 28 L. Ed. 291 (1884)); and such has been the construction given to the Interstate Commerce Act in a number of cases in the circuit courts and circuit courts of appeal, cited approvingly by the supreme court in the *Central Stock Yards* case, *supra*, 192 U. S. 568, 48 L. Ed. 565 (1904). See also *Little Rock & M. R. Co. v. St. Louis Iron Mountain & So. R. Co.*, 41 Fed. 559, and 59 Fed. 400 (1894); *Oregon Short Line & Utah Northern R. Co. v. Northern Pacific R. Co.*, 61 Fed. 158, 9 C. C. A. 409 (1894); *Allen v. Oregon Railroad & Navigation Co.*, 98 Fed. 16 (1899). It was held in all of these cases that through routing of passengers or freight depends upon *contract* voluntarily made between the carriers, and there is no power in the commission or courts to enforce the making of such a contract. *Prescott & Arizona Central R. R. Co. v. A. T. & S. F. R. Co.*, 73 Fed. 438 (1896), wherein the court comments on apparently different ruling in *N. Y. & Northern R. R. Co. v. N. Y. & N. E. R. R. Co.*, 50 Fed. 867 (1892). For discrimination by carrier between competing local transfer companies, see *St Louis Drayage Co. v. L. & N. R. R. Co.*, 65 Fed. 39 (1894). The commission said that in the act to regulate commerce, congress intended to effect the same results as the English statute, but omitted the machinery necessary to accomplish it, and it was therefore recommended that the act be amended in this particular. The commission has in its annual reports recommended to congress to give the necessary authority by new legislation. For amendments of 1906 and 1910 authorizing the commission to establish through routes, see *supra*, § 372.

A rail carrier may make a through rate with one line of connecting steamboats, and refuse to make such rates with other steamboats. 4 I. C. C. R. 265, 3 Int. Com. Rep. 278. The words "track and terminal facilities" in this section refer to all rail carrier, or a carrier part rail and part water, but not to an independent water line.

§ 279 (212). Discrimination in exacting prepayment from connecting carriers not unjust discrimination.—It follows from the principle, that through routing is a matter of contract,

that while the carrier is obliged to receive passengers and freight from other roads at connecting points, it is not obliged to waive the requirement of prepayment, and it therefore follows that the requirement of prepayment on freight on all property received from one carrier and not exacting such prepayment from a competing carrier is not an unjust discrimination. See *Little Rock & M. R. Co. v. St. Louis & Southwestern R. Co.*, 59 Fed. 400 (1893), and *Gulf, Colorado & Santa Fe R. Co. v. Miami Steamship Co.*, 30 C. C. A. 142, 86 Fed. 407 (1898); *Ilwaco Ry. & Navigation Co. v. Oregon Ry. & Navigation Co.*, 6 C. C. A. 495, 57 Fed. 673; *Little Rock & M. R. R. Co. v. St. L., I. M. & So. R. R. Co.*, *supra*.

§ 280. Discrimination in exacting prepayment from shippers. In *Gamble-Robinson Commission Co. v. C. & N. W. Ry. Co.*, 168 Fed. 161, in the circuit court of appeals of the eighth circuit, it was held, Judge Hook dissenting, that a common carrier did not violate the act by subjecting a party to unreasonable and undue preference in insisting upon his paying his freight bills in advance and refusing to give him the credit which it gave customarily to others. In the opinion of the court, the extension of credit was a favor, in effect a loan, to the shipper, which he had no right to ask, and therefore its refusal could in no way be the basis of a charge of discrimination or undue preference. On the other hand, it was strongly urged in the dissenting opinion, that the court should take notice of the general custom of the business, and that the favor extended to one shipper should be extended to all similarly circumstanced.

§ 281 (213). State control of interchange of interstate traffic. Questions have arisen out of the anomalous control of commerce by governmental authority of the states and the United States, as the same carriers are controlled by the state with reference to their intrastate traffic, and by the federal government as to interstate traffic. A belt or switching railroad is subject to the state authority when it charges local rates for its traffic and makes no interstate routing, while it becomes subject to the federal law when it joins with other carriers in making through shipments of interstate traffic. In the Louisville stockyards litigation, under the provisions of the state constitution of

Kentucky it was claimed that the defendant company was required to receive and deliver freight in the carloads to any point that was in physical connection with the tracks of another company. It was said by the United States court of appeals for the sixth circuit, 55 C. C. A. 63, 118 Fed. 113 (1902), that assuming, without deciding, that the Kentucky constitution and legislation made such requirement, that the state could not regulate interstate commerce, using the term in the sense of intercourse and interchange of traffic between the states. The power of the state to require connecting tracks between two railroad companies at an intersection for the transfer of cars used in the local business of such line of railroad was conceded. In the case before the court, it was not the means of making a physical connection with other railroads that was aimed at, but it was sought to compel the cars and freight received from one state to be delivered to another at a particular place and in a particular way. If the Kentucky constitution could be given any such construction, it would follow that it could regulate interstate commerce. The judgment in this case was affirmed by the supreme court, in 192 U. S. 568. The latter court did not decide this question of the power of the state with reference to interstate traffic, as it construed the Kentucky constitution as referring only to cases where freight was destined to some further point by transportation over a connecting line. It will be seen that in this case there was no authoritative construction of the state constitution and statute by the judiciary of the state.

At the time this suit of the Central Stockyards was filed a proceeding was also instituted before the Interstate Commerce Commission by the Railroad Commission of Kentucky, and the decision of the supreme court was followed by the commission, dismissing the complaint. 10 I. C. C. R. 173.

§ 282 (214). State and municipal control of terminals.—The last clause of the section, providing that the directing of facilities for interchange of traffic should not be construed as requiring the carrier to give use of its tracks or other terminal facilities to another carrier engaged in like business, was construed by the United States circuit court of Iowa, in *State of Iowa v. Chicago, Milwaukee & St. Paul Railroad Co.*, 33 Fed.

391, in 1887, soon after the adoption of the act. The state of Iowa, filed a bill in the state court against the defendant carrier to enforce an order of the State Board of Railroad Commissioners requiring the defendant to pass cars of other companies over its siding in the city of Dubuque at reasonable rates fixed by the board, the sidings having been laid under the permission of the city on condition that they should be open to all. The defendant carrier moved the case to the United States court, there being no diverse citizenship, on the ground that a federal question was involved, to-wit, its right in interstate traffic under section 3 of the act. The court sustained motion to remand the case, saying that the provision in the section as to the terminal facilities simply declared that the preceding provision of the section should not be deemed to give the right to one carrier to use the tracks or terminal facilities of another carrier in like business, and had reference to the effect of the act of congress, and to nothing else saying: "If the defendant company by a contract with the city of Dubuque has bound itself to allow other companies to use part of its tracks or terminal facilities this clause of the act of congress does not affect such a contract or the enforcement thereof. So also if the state of Iowa has provided by proper statute that different companies may have a joint or common use of certain terminal facilities, the rights of the several companies to such joint use are not affected by the provisions of the Interstate Commerce Act, but the same must be determined by the statute of the state." See also *Interstate Stockyards Co. v. Indianapolis U. R. Co.*, 99 Fed. 472 (1900), where there was a similar state and municipal regulation for the use of the terminal tracks.

§ 283 (215). The charging of local rates not an unjust discrimination.—When through rates and through billing are a matter of agreement between the carriers in interstate commerce, it follows that when a carrier with whom connecting carriers decline to make through rates delivers freight, it only has the right to demand that other carriers receive from and deliver freight for transportation at their published local tariff rates. See 4 I. C. C. R. 265, 3 Int. Com. Rep. 278; 3 I. C. C. R. 450, 2 Int. Com. Rep. 721. As to the distinction between local and through rates, see *supra*, section 2.

It was ruled by the commission in 7 I. C. C. R. 323, that in the absence of some agreement or understanding with a connecting line by which the joint tariff rates were authorized, a given carrier cannot lawfully apply any other rates than those which is fixed by the transportation between the points fixed by its railroad; and the rates so fixed are the only lawful rates which the carrier may charge for any transportation service which it may perform. The only rates authorized by the act are the rates established by a single carrier upon its route and the joint rates over continuous lines or routes operated by more than one carrier.

But while a carrier is not bound to make through routing, and in the absence of such agreements for through routing may charge its regular tariff rates, those charges must be *reasonable* for the service.

In *Augusta Southern Ry. Co. v. Wrightsville & T. R. Co.*, 74 Fed. 522, the court held that in the absence of through routing the carrier was not entitled to charge the full local rate permitted by the state law on freight which was not in reality local, but through freight. The decision in this case however cannot be reconciled with the authorities cited above unless upon the ground that the rate was unreasonable *per se* for the service.

§ 284. The right of exclusive through routing.—Through routing rests upon contract between the carriers except, of course, where the power of ordering a through routing is exercised by the commission under the act as amended in 1906. It follows, therefore, that a carrier may lawfully make a contract with one connecting carrier for through routing to the exclusion of another.

This subject has been extensively litigated in exclusive contracts in what are known as the Live Stock cases. While it is the duty of a railroad company to provide suitable facilities for receiving and delivering live stock at its station without additional compensation other than the regular transportation charge, it may provide these facilities by making an exclusive contract with one stockyards company, and as long as this company imposes no charge for delivering live stock when that stock is taken by the consignee within a reasonable time, such contract is not obnoxious to law. *Covington v. Keith*, 139 U. S.

128, 35 L. Ed. 73; *Butchers & Drovers Stockyards Co. v. L. & N. R. Co.*, 67 Fed. 35, *Central Stockyards Co. v. L. & N. R. Co.*, 55 C. C. A. 63, 118 Fed. 113, 192 U. S. 568, 48 L. Ed. 565.

In the case of the *Interstate Stockyards Co. v. Indianapolis Union R. Co.*, *supra*, the Indiana circuit court held that a belt line connecting with the different carriers and making agreements for continuous shipments of interstate commerce had no right to discriminate against different stockyards by refusing to deliver stock at one of the yards, though consigned to the owner for care, and the court granted a temporary injunction against the discrimination. In this case however the terminal road was expressly required by the state statute and its city franchises to render such services without discrimination, and it seems that the track connection had been made and the injunction was against the interruption of the service theretofore rendered.

§ 285 (217). Contract rights of trackage.—In the absence of statute the rights of a railroad company under a lawful agreement for the specified use of the tracks of another railroad company are measured in respect to the direct use in the terms of the contract, and the provisions of the act to regulate commerce apply to the situation created by the contract, and add no authority for a different use of the track. 3 I. C. C. R. 519, 2 Int. Com. Rep. 771. In this case it was ruled by the commission that the Rock Island Company which operated the Union Pacific tracks between Kansas City and Topeka upon condition that no intermediate business should be done by the Rock Island Company on any part of the line used under the agreement, the Pacific Company retaining the control of the road and supplying accommodations between the intermediate points and Kansas City. The majority of the commission said that such running arrangements existed in many parts of the country and were of great service in transportation. Chairman Cooley doubted the validity of the contract, but agreed that the commission had no jurisdiction to interfere with the arrangement.

In *Union Pacific Railroad Co. v. Chicago, etc., R. Co.*, 163 U. S. 564, 41 L. Ed. 265 (1896), the supreme court held that a later contract made between the same parties for trackage rights by the Rock Island Company over the Union Pacific

tracks from Council Bluffs to South Omaha, and giving the Union Pacific Company the right to operate the Rock Island tracks between South Omaha and Lincoln, was valid, and the court said that such business arrangements were in accord with the policy in favor of continuous lines declared by congress in the act of 1866 (*supra*, § 42), and that a railroad could contract to give another running rights over its tracks without express statutory authority, and the decree of the court below specifically enforcing the contract was affirmed. The contract in this case provided that the Union Pacific Company should do no intermediate business on the Rock Island's tracks.

§ 286. Rights of connecting carriers as to milling in transit privileges.—As through routing is based upon contract and the relation is not created by any application of the common law or requirement of statute, except where ordered by the commission, it follows that any railroad company may decline to become a party to any agreement for through routing unless the terms and conditions are satisfactory to it.

This principle has been applied by the commission, 9 I. C. C. R. 311, to the privilege of milling in transit granted by some roads. As before shown the commission has approved of this practice as promotive of commerce but no authority is given by the act, to the commission, to regulate the granting of such privileges. The commission ruled however that the Boston & Maine Railroad, receiving traffic from the west, was not compelled to apply that rate on shipments of feed, ground in transit; and that it was not bound by a private arrangement existing between the shipper and the carrier from whom he received the privilege, to grind his corn in transit. It was ruled in the same case however, that while the connecting carrier was bound by the arrangement for milling in transit, it could impose an arbitrary charge in addition to the regular through rate on the milled product.

As to right of carriers to judicial protection in the interchange of traffic, see *infra*, section 8, and as to unlawful combinations interfering with such interchanges, see *infra*, section 10.

§ 287. Exclusive contracts for station facilities not unlawful. In *Donovan v. Pennsylvania Company*, 199 U. S. 279, 50 L. Ed. p. 192 (1905), the supreme court affirmed the United States circuit court of appeals for the seventh circuit, 120 Fed. 215,

124 Fed. 1016, in affirming a decree of the circuit court enjoining cabmen from entering a railway station and grounds to solicit customers, and from congregating on the sidewalk in front of the station so as to interfere with the ingress and egress of passengers and employes entering the railway station and grounds of the railroad of complainant in Chicago. The railway company had made an agreement with a local transfer company to furnish at its passenger station all the vehicles necessary for the accommodation of passengers arriving there on its trains or on the trains of other railroad companies using the station; and the court held that it could rightfully exclude from the station and depot grounds all other hackmen or cabmen seeking entrance for the purpose of soliciting for themselves the custom or patronage of passengers. The court said that the licensed hackmen or cabmen, when not forbidden by valid municipal regulations, could within reasonable limits use the public sidewalks about the main entrance to the railway passenger station in prosecuting their calling; but they were not entitled to so congregate as to interfere with the ingress and egress of passengers and employes. The court also held that the absence of adequate legal remedy justified a resort to injunction.

In 20 I. C. C. R. 458, the commission followed this case in sustaining the arrangement made by the Wabash Railroad with a fruit auction company to conduct its business as an auctioneer of fruit and vegetables on the terminal premises of the defendant in St. Louis. The commission said there was no element of discrimination as between the different shippers that wished to use the auction company's service. The commission said that the right to grant exclusive privileges of this general nature in passenger stations had been much discussed in the courts of this country and in England, and had generally been sustained, although in a few of the states it had been denied, but that the decision in the supreme court in the case above cited had settled the matter. The commission said that it could not take cognizance of any claims except those of the traveling or shipping public.

SECTION 4.

§ 288. Long and short haul provisions.

289. History of the section and its amendments.

290. Construction of the section prior to the amendment of 1910.

291. "Over the same line."

292. Application to the commission.

293. The burden of proof.

294. Construction of section by commission and application to different classes of rates.

295. Ruling of commission as to export and import rates under section.

296. The commission on application for relief under the fourth section.

297. The five trade zones for transcontinental traffic.

§ 288. Long and short haul provisions.—Sec. 4. (*As amended June 18, 1910.*) That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through route than the aggregate of the intermediate rates subject to the provisions of this Act; but this shall not be construed as authorizing any common carrier within the terms of this Act to charge or receive as great compensation for a shorter as for

[Commission has authority to relieve carriers from the operation of this section.]

a longer distance: *Provided, however,* That upon application to the Interstate Commerce Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section: *Provided, further,* That no rates or charges lawfully existing at the time of the passage of this amendatory Act shall be required to be changed by reason of the provisions of this section prior to the expiration of six months after the passage of this Act, nor in any case where application shall have been filed before the Commission, in accordance with the provisions of this section, until a determination of such application by the commission.

[Water competition.]

Whenever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Interstate Commerce Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition.

§ 289. History of the section and its amendment.—This section was not based upon any provision in the English statute, and it was the subject of more thorough discussion in congress, and more divergent opinions than any other. The original bill in the house, known as the Reagan Bill, contained an absolute prohibition of charging more for a shorter than for a longer distance, and even when the longer distance included the shorter; while the senate bill, known as the Cullom Bill, contained a similar prohibition, qualified by the allowing of the granting of exceptions by the commission in special cases. The section was reported by the conference committee, and contained the words “under substantially similar circumstances and conditions,” qualifying the prohibition of the greater charge for a shorter than for a longer distance over the same line. In this form the section was enacted. These words “under substantially similar circumstances and conditions,” were taken from the second section. See 1 I. C. C. Rep. 4, and 1 Int. Com. Rep. 278.

The bill with these words “under substantially similar circumstances and conditions,” became a law and continued unchanged until the amendment of June 18, 1910, when these words were stricken out; so that now the section contains the prohibition unqualified of a greater compensation for a shorter than for a longer haul, with the same authority in the commission upon application to grant relief from the operation of the section which had existed in the original act. The amendment contains the further qualification that rates lawfully existing at the time of the passage of the amendatory act, shall not be required to be changed prior to six months after the passage of the act, nor in case of any pending application for relief until its determination by the commission.

The amended act contains the further new proviso that where a carrier by railroad reduces its rates in competition with a water

route, it shall not be permitted to increase the rates unless the commission finds that the proposed increase rests upon changed conditions other than the elimination of the water competition.

§ 290. Construction of the section prior to the amendment of 1910.—The judicial construction of the section prior to its late amendment really turned upon the real meaning of the words “under substantially similar circumstances and conditions,” and upon the effect of competition in determining dissimilarity of circumstances and conditions. The commission at first ruled (see opinion by Cooley, J., 1 I. C. C. Rep. 6, and 1 Int. Com. Rep. 278), that the existence of actual and controlling competition in respect to traffic important in amount might make out dissimilar circumstances and conditions, in effect leaving it with the railroads to determine in the first instance the existence of peculiar cases of competition which would constitute a dissimilarity of circumstances and conditions under the act. Subsequently, in 1892, the commission ruled that the carrier could not judge of this emergency for itself, but should apply to the commission when, after investigation, the exceptions could be made. See 5 I. C. C. Rep. 324, 4 Int. Com. Rep. 121; 5 I. C. C. Rep. 596, 4 Int. Com. Rep. 267.

These rulings were contested in the courts, and five years later, in 1897, the supreme court overruled the commission and established the rule that competition of any kind, whether from railroads subject to the act or not, was an effective circumstance that made substantially dissimilar circumstances and conditions; and that such competition when controlling, should justify the carrier in making a lower rate for the longer haul, not as a matter of grace or favor of the commission, but as a matter of right. *Import Rates Case*, 162 U. S. 197, 40 L. Ed. 940 (1896); *Commission v. Alabama & Midland R. Co.*, 168 U. S. 144, 42 L. Ed. 414 (1897); *L. & N. R. Co. v. Behmler*, 175 U. S. 648, 44 L. Ed. 309; *East Tenn., Va. & Ga. R. Co. v. Commission*, 181 U. S. 1, 45 L. Ed. 719 (1900); *Commission v. L. & N. R. Co.*, 190 U. S. 273, 47 L. Ed. 1047 (1902).

The effect of the amendment of 1910 is to restore the jurisdiction of the commission as it was exercised prior to this ruling of the supreme court. That is, the carrier cannot now judge for itself, but must apply to the commission under its power to grant

relief, and the commission then determines, not whether the circumstances are dissimilar, but whether the facts and conditions constitute a special case for the authorization of a lower charge for a longer than for a shorter distance.

As to the relation of this ruling of the supreme court to the prohibition of undue preferences under section 3, and as to the power of the commission to determine the reasonableness of rates, see *supra*, §§ 230 *et seq.* See also rulings of the commission in 9 I. C. C. Rep. 534; 9 I. C. C. Rep. 569, and 10 I. C. C. Rep. 460.

§ 291 (223). "Over the same line."—The view was expressed in the opinion in the United States court of appeals, *Osborne v. R. R. Co.*, 3 C. C. A. 347, 52 Fed. 912 (1892), that when two railroad companies owning connecting lines of road unite in a joint through tariff with the view of making the connecting roads a new and independent line, the through tariff on the joint line is not a standard by which the separate tariff of other companies is to be measured in determining whether the fourth section was violated. In the *Social Circle Case*, 162 U. S. 184 (1896), 40 L. Ed. 935, a Georgia railway company whose road lay wholly within the state of Georgia and exacted and received its regular local rate for the transportation on its line, on a through bill of lading, the rate of which was fixed by adding that local rate to the through rate from Cincinnati to Atlanta, was held subject as to the through bill from Cincinnati to Social Circle to the federal act and to the control of the Interstate Commerce Commission. The court distinguished the *Osborne Case*, *supra*, upon its special facts, and said that when goods shipped under a through bill of lading from a point in one state to a point in another are received in transit by a state common carrier on a conventional division of the charges, such carrier must be deemed to have subjected the road to an arrangement for a continuous carriage or shipment within the meaning of the act to regulate commerce. Having elected to enter into the carriage of interstate freights and thus subjected itself to the control of the commission, the carrier could not withdraw that control with respect to foreign traffic to certain points on its road and exclude other points. The court added: "When we speak of a through bill of lading, we are referring to the usual methods in use by connecting com-

panies, and must not be understood to imply that the common control, management or arrangement might not be otherwise manifested.”

§ 292. Application to the commission.—Under the original act, after the ruling of the supreme court as to the right of the carrier to judge for itself in the first instance of the controlling effect of competition in authorizing a greater charge for a shorter than for a longer haul, the occasion for a resort to the discretionary power of the commission under the proviso, was very materially effected. During the period when a different rule prevailed such applications were comparatively numerous, as may be seen from the reports of the Interstate Commerce Commission. For a summary of the commission’s rulings upon applications made for relief, made prior to this ruling of the supreme court, see annual report of 1892, pages 18 to 21; 1893, page 22; 1894, page 18, and 1895, page 24.

Petitions for relief were asked on other grounds than that of controlling competition. Thus the World’s Fair at Chicago was held, in 6 I. C. C. R. 323, and 6 I. C. C. R. 328, to be a case of an exceptional and special nature justifying relief from the operation of the section. The same ruling was made in the case of an application on account of crop failure and the necessity of reduced rates for the transportation of food for the people and their animals. These cases however were exceptional and nearly all the applications for relief were on the ground of controlling competition. It was said by the commission in its report of 1897 that the effect of the decisions of the supreme court was to eliminate the fourth section from the act.

§ 293 (225). The burden of proof.—Although the judicial construction of the term “under similar circumstances and conditions” had a very profound effect upon the administration of the act, it is not strictly correct to say that its effect was to eliminate the fourth section. It put upon the carrier the burden of proving the existence of dissimilar circumstances and conditions for its justification when the fact of the greater charge for the shorter haul over the same line appears.

Under the section as amended, the jurisdiction of the commission will be invoked, not to determine whether the circumstances

are dissimilar, as those qualifying words are now omitted from the section, but whether under the circumstances the carrier presents a case for the exercise of the discretion of the commission in relieving it from the prohibitions of the section.

§ 294. Construction of section by commission and application to different classes of rates.—The long and short haul provision of this section did not take effect as to the existing rates until six months after the passage of the act, that is, until Dec. 18, 1910. Prior to this date, in October, 1910, the commission, acting under its general authority under the section, extended the existing rates until February, 1911, providing, however, that the discrimination against intermediate points should not be greater than in existence August 17, 1910, except under certain described competitive conditions. Carriers desiring relief from section 4 were directed to make separate application for freight rates and passenger rates and also for long and short hauls. This extension order was made with the statement that the commission reaffirmed its express view that a through rate or fare that was higher than a combination of intermediate rates was *prima facie* unreasonable.

On March 13, 1911, applications for relief having been filed by the transcontinental and other lines the commission made the following ruling as to the application of the amended section to different classes of rates:

“(1) The fourth section applies to all rates and fares, but in determining whether its provisions are contravened, rates and fares of the same kind should be compared with one another; that is, transshipment rates should be compared with transshipment rates, proportional rates with proportional rates; excursion fares with excursion fares and commutation fares with commutation fares. It would not be in violation of the fourth section, for instance, if a proportional rate to or from a given point were lower than a regular rate to or from an intermediate point, nor if a commutation fare to or from a more distant point were lower than a regular fare to or from an intermediate point.

“A proportional rate is defined as one which applies to part of a through transportation which is entirely within the jurisdiction of the act to regulate commerce; that is, the balance of the transportation to which the proportional rate applies must

be under a rate filed with this commission. A rate to a port for shipment beyond by a water carrier, not subject to the provisions of this act, would not be a proportional rate.

“(2) Where from the absorption of a switching charge it results that a total transportation charge from a more distant point to the point where the property is delivered is less than the total transportation charge from or to an intermediate point, the fourth section is violated. Owing however to the very general practice of absorbing switching charges from competitive and not from non-competitive stations, and in view of the fact that more benefit and little complaint results, the commission will by general order permit a continuance of this practice, reserving for consideration and determination individual cases which may require separate consideration.”

§ 295. Ruling of commission as to export and import rates under the section.—On December 17, 1910, the commission made a ruling as to the application of the section as amended to export and import rates.

“(1) That inland export and import rates are subject to the provisions of the act and within the jurisdiction of the commission.

“(2) That the fourth section of the amended act forbids carriers subject thereto without authority from the commission, in accordance with the said section, to charge more for the transportation of a like kind of export or import traffic for a shorter than for a longer haul over the same line in the same direction, that is, as we understand the law the validity of the rate under the section is determined by comparison of an export rate with an export rate, and import rate with an import rate.

“(3) So far as the fourth section is concerned carriers are not required in the first instance to establish export and import rates which shall be measured and limited by domestic interstate rates between the same points of origin and destination in the United States; but as export and import rates as well as domestic interstate rates are subject to the provisions of the act and the jurisdiction of the commission, it is clear that the reasonableness of any of these rates under the provisions of section one, and the questions of discrimination under the third section, may all be considered and the commission may condemn

any discrimination in export and import rates upon comparison with those applicable on domestic interstate traffic to the extent that the same may be found unjust or unreasonable in any particular case upon investigation and full hearing.”

§ 296. The commission on application for relief under the fourth section.—In opinions filed June 22, 1911, 21 I. C. C. R. 329, and 21 I. C. C. R. 400, the commission exhaustively considered the history and purpose of the amendment of the fourth section concerning the long and short haul clause, and ruled that the amendment was a provision of law within the proper scope of congressional jurisdiction and was not a grant of arbitrary or absolute power, and that its purposes must be limited and conditioned upon the presence in special cases of conditions and circumstances which would make such exceptions legal and proper and in no wise antagonistic to other provisions of the act. Under the proviso it must be affirmatively shown by the carriers in seeking exception that injustice will not be done to intermediate points by allowing rates to the more distant points. The enactment of the amended law was to make its prohibition of the higher rate for the shorter haul a rule of well nigh universal application from which the commission may deviate only in special cases, and then to meet transportation circumstances which are beyond the carrier's control. The commission said that congress intended to invest the commission with authority, not only to determine whether a wrong results from the disregard of the long and short haul provision, but also to correct that wrong if found to exist.

In the application for relief as made the commission must inquire whether the maintenance of the higher intermediate rate will result in unreasonable charges and unjust discriminations, and the commission may also prescribe in any way that is definite and certain the extent to which the intermediate rate may exceed the long distance in cases where this is necessary to prevent unreasonable rates or unjust discriminations.

In 21 I. C. C. R. 329, the commission gave an interesting review of the long-time struggle between the transcontinental railroads and the ocean carriers, and concludes that the transcontinental lines naturally gave consideration to sea competition, but that for thirty years the whole of their efforts had been to

neutralize and control such competition. The opinion intimates that the railroads must soon meet with competition by water more important, searching and determinative in its effect upon railroads than any other; that is, when the route by the Panama canal is opened.

The enforcement of these orders of the commission has been temporarily enjoined by the commerce court (Nov. 1911) and it is understood that the alleged confiscatory character of the orders will finally be determined by the supreme court.

§ 297. The five trade zones in transcontinental traffic.—In the reports referred to on the applications for relief under the fourth section, under the amendment of 1910, the commission ruled that the carriers had not shown that undue discrimination was not affected by their rate adjustment between points in Nevada and points in California, nor had they established that the rates to the coast cities if extended by them from eastern points outside the zone of water influence were not fully compensatory. The applications for relief by the transcontinental carriers from the long and short haul clause were therefore denied. The cities of Spokane and Salt Lake City were held specifically to be prejudiced by the charge of the through rate to the coast with the local rate added.

The commission announced that for the purpose of disposing of this matter by an order under the fourth section, they had divided the United States into five territorial zones, as follows:

“(The transcontinental groups hereinafter described are as specified in R. H. Countiss’ agent’s transcontinental tariff, I. C. C. No. 929.)”

“Zone No. 1 comprises all that portion of the United States west of a line called line No. 1, which extends in a general southerly direction from a point immediately east of Grand Portage, Minn.; thence southwesterly along the northwestern shore of Lake Superior, to a point immediately east of Superior, Wis.; thence southerly, along the eastern boundary of transcontinental group F, to the intersection of the Arkansas and Oklahoma state line; thence along the west side of the Kansas City Southern Railway to the Gulf of Mexico.

“Zone No. 2 embraces all territory in the United States lying east of line No. 1 and west of a line called line No. 2, which

* R. H. Countiss referred to, is the agent of the trans-continental lines for the purpose of compiling, publishing, and filing with the commission their tariffs on classes and commodities.

begins at the international boundary between the United States and Canada, immediately west of Cockburn Island, in Lake Huron; passes westerly through the Straits of Mackinaw; southerly through Lake Michigan to its southern boundary; follows the west boundary of transcontinental group C to Paducah, Ky.; thence follows the east side of the Illinois Central Railroad to the southern boundary of transcontinental group C; thence follows the east boundary of group C to the Gulf of Mexico.

"Zone No. 3 embraces all territory in the United States lying east of line No. 2 and north of the south boundary of transcontinental group C and west of line No. 3, which is the Buffalo-Pittsburg line from Buffalo, N. Y., to Wheeling, W. Va.; thence follows the Ohio river to Huntington, W. Va.

"Zone No. 4 embraces all territory in the United States east of line No. 3 and north of the south boundary of transcontinental group C.

"Zone No. 5 embraces all territory south and east of transcontinental group C."

And the commission added (21 I. C. C. R. 425):

"Looking at this whole situation and endeavoring to justly consider the interests of all parties affected, including the carriers, we are of the opinion that from zone 1 no higher charge can justly be made at any intermediate point than to a more distant point. The eastern limit of this territory is approximately 1,500 miles from the Atlantic seaboard, almost midway between the Pacific and Atlantic oceans. No traffic has ever been, and none probably ever will be transported from this section to the Atlantic coast and thence by water to the Pacific coast. Giving full weight to the effect of competition of all kinds, we can find no justification for a system of rates which maintains from this territory a higher charge to an interior point than is made to the coast.

"With respect to territory embraced in zone 2 the case stands somewhat different. This zone comprises the Mississippi Valley and a considerable portion of the great manufacturing area of the west. It lies 400 miles nearer the Atlantic seaboard, with which it is connected in part at least by lines of railroad affording the cheapest transportation service in any part of the country. Still there never has been and there probably never will be in the future any considerable movement of traffic from this territory to the Pacific coast by way of the Atlantic seaboard.

"We are of the opinion that rates from this territory to intermediate points may properly exceed by not more than 7 per

cent. rates from the same points of origin to Pacific coast terminals.

“From zone 3 there is still greater possibility of actual transportation competition on business destined to Pacific coast points, although from this section hitherto the actual movement has been only occasional.

“We are of the opinion that from points of origin in this territory rates to intermediate points may properly exceed those to terminal points by not more than 15 per cent.

“In the past the actual movement from eastern points of origin to Pacific coast terminals has been mainly confined to zone 4, and even in this zone the greater part of the traffic has originated in or near the seaboard itself.

“The force of water competition is greatest in New York and gradually diminishes as the distance from New York increases, but we are of the opinion that this entire territory may properly be treated as a single group, and that rates from points of origin within its limits to intermediate points may properly exceed those to terminal points by not more than 25 per cent.

“No opinion is expressed at this time as to zone 5, since rates from that territory are not involved in these proceedings.”

The commission said that this was not a new and additional authority, but simply the exercise of a jurisdiction provided for in the fifteenth section for the adjustment of unjust discrimination, and that there was no essential difference between this order and an order which the commission might make under the third section.

SECTION 5.

§ 298. Pooling of freight and division of earnings forbidden.

299. Construction of section.

300. Controlling through routing by initial carrier is not pooling.

301. Agreements not within the prohibition.

302. The relation of the section to the Anti-Trust Law of 1890.

303. Pooling as a defense to action of the carrier.

§ 298. Pooling of freight and division of earnings forbidden. Sec. 5. That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any case of an agreement for the pooling of freights as aforesaid, each day of its continuance shall be deemed a separate offense.

§ 299 (227.) Construction of section.—This section has not been amended. It was more thoroughly discussed in congress and in the public press before the enactment of the statute than any other, except the long and short haul provision of section 4, yet in view of its importance as a declaration of public policy, it has received comparatively little discussion in the courts or before the commission. In 115 Fed. 588 (1902), this section was construed by the court, Hammond, J., in the western district of Tennessee, in a charge to the grand jury. He said that the statute contemplated two methods of pooling, both of which were prohibited. First a *physical* pooling, which means a distribution by the carriers of property offered for transportation on different and competing railroads in the proportions and on the percentages previously agreed upon; and secondly, a *money* pooling, which is described best in the language of the statute, “to divide between them (different and competing railroads) the aggregate or net proceeds of the earnings of such railroads, or any portion thereof.” The court in its charge adopted the definition of the word “pool” from the Century dictionary, as:

“It is a combination intended by concert of action to make or control changes in the market of rates; * * * a combination of the interests of several otherwise competing parties,

such as rival transportation lines, in which all take common grounds as regards the public, and distribute the profits of the business among themselves equally or according to special agreement. In this sense pooling is a system of reconciling conflicting interests and obviating competition by which the several competing parties or companies throw their revenues into one common fund, which is then divided or distributed among the members of the pool on a basis, percentage or proportion previously agreed upon or determined by arbitration."

The agreement of the Southern Railway and Steamship Association provided for a division of territory between eastern and western lines, and also a system of fines and penalties among the members for violation of the association rules. The commission said in 6 I. C. C. R. 195, that these fines and penalties are available as substitutes for the penalties which would be exacted under a regular pooling system, and that the arrangement was tantamount to a combination forbidden by the section, and that the law had regard to the substance rather than to the form, and that whatever it prohibited from being done directly could not legally be done indirectly.

§ 300. Controlling through routing by initial carrier is not pooling.—In the Southern California Fruit Case, 9 I. C. C. Rep. 182, the commission found there was a tonnage pool in traffic as between the connecting carriers and that the through routing was controlled so as to give specific percentages of traffic to their said connections. This view was sustained by the circuit court (S. D. of Cal.), 123 Fed. 597, and 132 Fed. 829, which rendered judgment for the enforcement of the commission's order, that the carrier should desist from this practice of controlling the through routing. The supreme court in *Southern Pacific et al. v. Interstate Commerce Commission*, 200 U. S. 356, 50 L. Ed. 585 (1906), reversed this judgment, holding that there was nothing in the act which prevented carriers from agreeing upon a through routing of the freight and of insisting upon the right of routing as a condition of guaranteeing through rates to the shipper. It seems that the rule was intended to break up rebating and in practical operation had been effective to that end.

Subsequent to this decision, by the amendment of 1910, this right of controlling the through routing was secured to the shipper (see section 15, *infra*).

§ 301 (229). Agreements not within the prohibition.—An agreement for the division of through freights between the members of a trunk line is not within the prohibition of this section. Neither is an agreement for consultation for the promotion of reasonable rates. 6 I. C. C. R. 85. In this case the commission ruled that the agreement of the transcontinental association was not within the prohibition of the section, as there was no provision for the actual pooling of freights or division of earnings between the parties, and it was not shown by the agreement itself or other evidence that the measures provided therein for fixing and maintaining rates constituted a contract, agreement or combination in violation of section 5, or that those measures if carried out in good faith for the purpose named, would lead indirectly to the same result as the actual pooling of freights and division of earnings prohibited by the act.

The operation and conduct of the Immigrant Bureau of the Western Passenger Association, whereunder the immigrant traffic was divided between the carriers in the agreed proportion based upon the proportion of the domestic passenger traffic done by each line, was not within the prohibition of the section. 10 I. C. C. R. 13. The commission said that the section forbade a division of the aggregate or net proceeds of the earnings of such competing railroads, whether such earnings arise from freight or passenger business, but for some reason it did not provide specifically against a division of passengers between competing roads. The amount of the immigrant traffic was insignificant compared with the general traffic of the railroads, and there was no discriminations against individuals, as the immigrants were forwarded at the domestic published rates and that the arrangements had eventually prompted the protection and greatly improved the comfort and treatment of immigrants. The commission declined therefore to take any action in the premises.

It would therefore follow that the prohibition of this section must be limited to an actual pooling of freights of competing railroads or the division of earnings, and would not include agreements between carriers looking to the convenient and expeditious handling of their business at terminal points which are not for revenue and therefore not subject to the specific prohibition of this section or of the Anti-Trust Act. See *infra*, § 432 *et seq.*

§ 302 (230). The relation of the section to the Anti-Trust Law of 1890.—The prohibition of pooling contained in this section has been considered in connection with the judicial discussion of the prohibition of all forms of combination whether of trusts or otherwise in restraint of interstate commerce contained in the Anti-Trust Law of 1890.

This section prohibits only the specific form of combination which comes under the definition of pooling, and it is limited to such agreements made by a common carrier subject to the provisions of the act "with any other common carrier or carriers." Thus it was ruled in the case of a complaint alleging an agreement for the pooling of freight between certain railroads and the Standard Oil Company, 5 I. C. C. R. 415, 4 Int. Com. Rep. 162, that such an agreement for the pooling of traffic between a carrier by rail and a carrier by pipe line did not fall within the description of contracts prohibited by section 5. In the opinion as to the relation of express companies to the act, ruling that they were not included therein (see section 1. *supra*), the commission said that the prohibition of section 5 did not include express companies, who were therefore at liberty to pool their earnings. 1 I. C. C. R. 349, 1 Int. Com. Rep. 677. This was prior to their inclusion in the act by the amendment of 1906, *supra*, § 138.

In *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, 41 L. Ed. 1007, it was urged that as the Commerce Act related solely to railroads and their proper regulation and management, the act of 1890 should be construed as applying to all contracts of the nature therein described, entered into by any other than competing common carriers by railroads for the purpose of establishing rates of traffic and transportation. But the court said that the fifth section of the Interstate Commerce Act prohibited what was termed "pooling," because prior to the passage of the act railroad companies had some times endeavored to regulate competition and maintain rates by pooling arrangements, and in the act that kind of arrangement was forbidden, and while that act did not prohibit such an agreement as that of the Trans-Missouri Freight Association, it did not authorize it, and both statutes stand, as neither was inconsistent with the other. The court said that the amendment of the Interstate Commerce Act would not have been an appropriate method of dealing with other devices to suppress competition

for the reason that the Anti-Trust Act included other parties than common carriers. (See act of 1890, *infra*, § 432 *et seq.*

In the bill filed by the government in 1910 in eastern district of Missouri against the Western Trunk lines to enjoin the proposed general advance in freight rates, wherein a temporary injunction was issued, it was alleged that the advance was made pursuant to an agreement and combination violative of the Anti-Trust Act. As the railroads agreed to withdraw the proposed advance, and refile the same after the pending amendatory act went into effect, the suit was dismissed.

In complaints by shippers and others before the commission it has been on several occasions charged that their rates were the result of an agreement between the carriers in violation of the Anti-Trust Act, and that this raised a presumption that the rates were unreasonable, but the commission has uniformly ruled that it has no powers in the enforcement of that act, and that there was no presumption of unreasonableness under the Interstate Commerce Act, if the rates were established in consequence of an agreement between competing carriers. 20 I. C. C. R. 463, 465.

§ 303 (231). Pooling as a defense to action of the carrier.—In *L. L. & W. R. Co. v. Frank et al.*, 110 Fed. 689 (1901), the United States circuit court for the western district of New York, denied an injunction against certain ticket brokers as to special excursion tickets issued for the Pan-American Exposition at Buffalo on the ground that the complainant with other railroads had made an unlawful combination for the fixing of rates and pooling earnings.

A contrary ruling however has been made in the United States circuit court for the eastern district of Missouri, unreported, and in *Kinner v. Lake Shore & Michigan So. Ry. Co.*, 69 Ohio St. Rep. 339, on the ground that the alleged unlawful combination did not relate to the specific business sought to be enjoined.

SECTION 6.

§ 304. Section 6 as amended.

305. History and amendment of the section.

306. Effect of publication.

307. The published rate conclusive.

308. Failure to post rate in stations.

309. Claims for misrouting.

310. Status of carriers, as shippers or consignees.

311. What is included in schedules.

312. What is sufficient publication and filing.

313. Joint tariffs and through rates.

314. Responsibility for through rates.

315. Published joint rates must be duly authorized.

316. The commission's power of modification as to filing of tariffs.

§ 304. Section 6 as amended.—SEC. 6. (*Amended March 2, 1889. Following section substituted June 29, 1906. Amended June 18, 1910.*) That every common carrier subject to the provisions of this Act shall file with the commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print, and keep open to the public in-

[Printing and posting of schedules of rates, fares and charges including rules and regulations affecting the same, icing, storage and terminal charges, and freight classifications.]

spection, as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places

in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this Act.

[Printing and posting of schedules of rates on freight carried through a foreign country.]

Any common carrier subject to the provisions of this Act receiving freight in the United States to be carried through a foreign country to any place in the United States shall also in like manner print and keep open to public inspection, at every depot or office where such freight is received for shipment, schedules showing the through rates established and charged by such common carrier to all points in the United States beyond the foreign country to which it accepts freight for shipment;

[Freight subject to customs duties in case of failure to publish through rates.]

and any freight shipped from the United States through a foreign country into the United States the through rate on which shall not have been made public, as required by this Act, shall, before it is admitted into the United States from said foreign country, be subject to customs duties as if said freight were of foreign production.

[Thirty days' public notice of change in rates must be given.]

No change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the Commission and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to pub-

[Commission may modify requirements of this section.]

lic inspection: *Provided*, That the Commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified, or modify the requirement of this section in respect to publishing, posting, and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions.

[Joint tariffs must specify names of carriers participating. Evidence of concurrence.]

The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the Commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the Commission, and

where such evidence of concurrence or acceptance is filed it shall not be necessary for the carriers filing the same to also file copies of the tariffs in which they are named as parties.

[Copies of contracts, agreements or arrangements relating to traffic must be filed with Commission.]

Every common carrier subject to this Act shall also file with said Commission copies of all contracts, agreements, or arrangements with other common carriers in relation to any traffic affected by the provisions of this Act to which it may be a party.

[Commission may prescribe forms of schedule.]

The Commission may determine and prescribe the form in which the schedules required by this section to be kept open to public inspection shall be prepared and arranged and may change the form from time to time as shall be found expedient.

[No carrier shall engage in transportation unless it files and publishes rates, fares, and charges thereon.]

No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this

[Published rates not to be deviated from.]

Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs: *Provided,*

["Carrier" means "common carrier."]

That wherever the word "carrier" occurs in this Act it shall be held to mean "common carrier."

[Preference and expedition of military traffic in time of war.]

That in time of war or threatened war preference and precedence shall, upon the demand of the President of the United States, be given, over all other traffic, to the transportation of troops and material of war, and carriers shall adopt every means within their control to facilitate and expedite the military traffic.

[Commission may reject schedules.]

The Commission may reject and refuse to file any schedule that is tendered for filing which does not provide and give lawful notice of its effective date, and any schedule so rejected by the Commission shall be void and its use shall be unlawful.

[Penalty for failure to comply with regulation.]

In case of failure or refusal on the part of any carrier, receiver, or trustee to comply with the terms of any regulation

adopted and promulgated or any order made by the Commission under the provisions of this section, such carrier, receiver, or trustee shall be liable to a penalty of five hundred dollars for each such offense, and twenty-five dollars for each and every day of the continuance of such offense, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

[Carrier to furnish written statement of rate.]

If any common carrier subject to the provisions of this Act, after written request made upon the agent of such carrier hereinafter in this section referred to, by any person or company for a written statement of the rate or charge applicable to a described shipment between stated places under the schedule or tariffs to which such carrier is a party, shall refuse or omit to give such written statement within a reasonable time, or shall misstate in writing the applicable rate, and if the person or company making such request suffers damage in consequence of such refusal or

[Damages for misstatement of rate.]

omission or in consequence of the misstatement of the rate, either through making the shipment over a line or route for which the proper rate is higher than the rate over another available line or route, or through entering into any sale or other contract whereunder such person or company obligates himself or itself to make such shipment of freight at his or its cost, then the said carrier shall be liable to a penalty of two hundred and fifty dollars, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

[Name of carrier's agent to be posted.]

It shall be the duty of every carrier by railroad to keep at all times conspicuously posted in every station where freight is received for transportation the name of an agent resident in the city, village, or town where such station is located, to whom application may be made for the information by this section required to be furnished on written request; and in case any carrier shall fail at any time to have such name so posted in any station, it shall be sufficient to address such request in substantially the following form: "The Station Agent of the _____ Company at _____ Station," together with the name of the proper post-office, inserting the name of the carrier company and of the station in the blanks, and to serve the same by depositing the request so addressed, with postage thereon prepaid, in any post-office.

§ 305. **History and amendment of the section.**—This section has been extensively amended; first in 1889, in the first series of amendments made to the act, which provided for printing of the schedule and posting in two public and conspicuous

places, prohibited reduction of rates without three days' notice, and made a more specific provision as to the power of the Commission in prescribing different schedules, rates, fares and charges.

The section was also amended by the so-called Elkins Act of 1903 (*infra*, § 422), in the requirement of publication and the invariable application of the tariff rates, making the rate conclusive as against the carrier.

In the amendments of 1906, the section was substantially rewritten. The important changes were, first, the requirement of the same publication of the joint rate as of the separate rates. Theretofore the measure of publicity given to joint rates was prescribed by general order of the commission. Second, change in the rates, either separate or joint, was prohibited except after thirty days notice, while before the amendment, ten days notice was required of an increase and three days notice of a decrease. Third, the requirement of a separate printing and posting, not only of terminal charges and all other charges which the commission might require, and all privileges or facilities granted or allowed. Fourth, the requirement as to posting and notice could be modified on good cause shown.

The section was also amended by the act of 1910, in authorizing the commission to reject any schedule tendered for filing which did not provide an effective date. The failure of a carrier to comply with the terms of any regulation adopted under the section was penalized, and the carrier was required to furnish a written statement of rate on request, made subject to damages for any mistake or omission of a rate, and it was made the duty of the carrier to keep the name of its agent posted in its station where freight was received for transportation.

The importance of these successive changes should be considered in connection with the decisions of the commission and of the court construing the section at the different periods.

§ 306 (234.) Effect of publication.—In *Gulf, Colorado & Santa Fe Railroad Co. v. Hefley*, 158 U. S. 98, 39 L. Ed. 910 (1895), the supreme court decided that all railroads carrying interstate freight were subject to the provisions of the act to regulate commerce, and that the only rule of compensation which can be followed in regard to interstate shipments in the rate ex-

pressed in tariffs published at stations and filed with the commission in accordance with the requirements of the act. In this case there was conflict between the Texas law containing a provision for recovery of a penalty in the case of a violation, while the federal statute prohibits carriers from deviating from tariff rates published and on file, and providing penalties for any departure therefrom. The court held that these two statutes prescribing a different rule on the subject-matter, exposed a party to a conflict of duties, and that in the case of an interstate shipment, the state law must yield.

As to the effect of the published rates upon the standard of reasonableness in an action at law for alleged unreasonable charges, see *supra*, section 1.

Contracts and tariffs filed with the commission under this section may be considered in any proceeding before the commission, although not specifically introduced in evidence on the hearing. 4 I. C. C. R. 664, 3 Int. Com. Rep. 493. The reduction of passenger rates without consent of connecting lines, over which tickets are sold, and without filing schedules with the commission was ruled in violation of this section. 2 I. C. C. R. 513, 2 Int. Com. Rep. 340.

The filing of schedules of rates with the commission as required by statute raises no presumption as to the legality of such rates, and no omission or failure to challenge or disapprove the schedules of rates so filed can have the effect of making rates lawful which are unreasonable. 4 I. C. C. R. 104, 3 Int. Com. Rep. 138.

When a schedule is filed announcing an advance of general application, for which no apparent reason exists, such action is a proper subject of investigation, and if it thereupon appears that the advance is unwarranted, the commission will proceed to correct the injustice. 9 I. C. C. R. 382. It is the duty of the carrier to apply the rate as published, and where it appears in the complaint before the commission that a contract was made for a lower charge than published, the contract is not binding and its violation furnishes no ground for redress under the act. See 9 I. C. C. R. 216. The commission said that that question had been decided by the supreme court in the Hefley Case, *supra*. See amendatory act of February 19, 1903, *infra*, § 422, making the failure to publish the tariff, or to strictly

observe the tariff, until changed, a misdemeanor, and also declaring the published rate conclusively deemed to be the legal rate.

It was held in *United States v. DeCoursey* 82 Fed. 302 (1897), that a receiver is not criminally liable under this section for violation of a joint tariff previously established by a railroad company of which he is receiver and another company which he has not ratified, adopted or recognized in any way.

§ 307. The published rate conclusive.—Under this section before its amendment in 1906, it was held by the supreme court in *Texas Pacific R. Co. v. Mugg*, 202 U. S. 24, and 50 L. Ed. 620, May 24, 1906, reversing the Texas civil court of appeals, 98 Tex. 352, that a carrier could exact the regular rate for an interstate shipment as shown by its published and printed schedule on file with the Interstate Commerce Commission and posted in the station of the carrier, although a lower rate had been quoted by the carrier to the shipper and shipped under such lower rate so quoted. The court said that this was within the principle of the decision of the *Hefley Case*, *supra*. It was said by the commission in 17 I. C. C. R. 418, that the published rate governing transportation between two given points, so long as it remains uncanceled, is as fixed and unalterable either by the commission or by the carrier, as if that particular rate had been established by a special act of congress. When regularly published it is no longer the rate imposed upon the carrier, but the rate imposed by law.

The commission in its annual report, 1908, p. 16, in commenting upon this decision of the supreme court in the *Mugg Case*, said that the theory of the act was that the shipper could at all times by reference to the schedules ascertain for himself the rate, but that in practice it was quite different, as the tariffs were very voluminous; and that it had been found practically impossible to comply with the literal requirement of the statute as to the posting; that in a great majority of cases the ordinary shipper could not without special experience ascertain for himself from an inspection of the tariffs what the rates are, and he must rely on the statement of the railroad agent, and added:

“The commission feels that to require the shipper to ascertain for himself at his peril the rate imposed upon him an undue

burden. The railway should know what its established charges are, and may fairly be required to state in writing, when a written request is made by the shipper, the rate which it has published and maintains in force. We call special attention to this matter as one of immediate and general concern, which discloses the need of an appropriate remedy, and urgently request that a suitable measure be promptly enacted.”

The amendment of 1910 provides for a penalty of \$250 to accrue to the United States to be recovered by civil action against the carrier brought by the United States, for any misstatement by the carrier as to the rates whereby the shipper suffers damage.* Whether any remedy is available to the shipper for such damage has not been judicially determined. See § 308, *infra*. The commission has ruled (18 I. C. C. R. 299) that it has no power under the Act to award such damages to the shipper.

Any unpublished rate made by the agent of a carrier, whether through mistake or otherwise, is, therefore, unenforcible by the carrier or shipper; and decisions, such as the *Pondecker Lumber Co. v. Spencer*, 86 Fed. 846 (1898), and certain state decisions sustaining recovery by the shipper in such cases, would seem to be inapplicable under the construction of this section as amended. See *Armour Packing Co. v. U. S.*, C. C. A. eighth circuit, 153 Fed. 18 (1907).

The word “different,” included by the amendment of 1906 in the prohibition against the carrier charging any other than the schedule rate, extends this prohibition to any evasion by indirection of the fundamental requirement of publicity of rates, conformity thereto and equality in such rates to all similarly conditioned. The practice of using transportation in payment of advertising services and claims was condemned by the supreme court as violative of this section. See *supra*, § 156. The section does not repeal section 22, nor impair the power of the carrier as thus recognized to adjust its rates to different classes and conditions.

* It was said in the report of the house committee on interstate and foreign commerce, in reporting the amended bill of 1910, that the “bill does not provide for any redress to the shipper who may have suffered loss on account of misquotation of the tariff rate, for the reason that it has so far seemed impracticable to find any method of so doing without opening a loophole for the allowance of secret rebates in such manner as would be practically unprovable in criminal proceedings.

§ 308. Failure to post rates in stations.—In *Texas Pacific R. Co. v. Cisco Oil Mill*, 204 U. S. 449, 52 L. Ed. 562 (1907), it was claimed that a rate schedule not having been lawfully posted in public and conspicuous depots, waiting rooms, offices etc., was itself unlawful and therefore not binding upon the carrier. The court said that the contention was without merit and that the requirement of posting was not a condition precedent to the establishment and putting in force the tariff of rates, but it was a provision based upon the existence of an established rate, and had for its definite object the affording of special facilities to the public for ascertaining the rates actually in force.

The court added: "Whether by the failure to post an established schedule, a carrier became subject to penalties provided in the act to regulate commerce, or whether, if damage had been occasioned to a shipper by such omission, a right to recover on that ground alone would have obtained, we are not called upon in this case to decide."

This decision was prior to the amendment of 1910 which expressly penalizes any failure by the carrier to perform its duty or any misstatement whereby a shipper suffers damage.

This decision was construed and applied by the commission in 14 I. C. C. R. 82; and it declined to allow a refund to the shipper, where the delay in posting the tariff was due to unforeseen causes, though the carrier was willing to pay the amount claimed, saying that it was an unpleasant duty to deny such request, and thus prevent shippers from receiving refunds which the carrier was willing to pay, but that the issuance of such authority would be in contravention of the terms or purposes of the law and would establish a wrongful precedent.*

§ 309. Claims for Misrouting.—It follows therefore that the published rates are conclusive upon both the carrier and the shipper, that the misrepresentation by the agent of a carrier as to the rates is not binding on the carrier although he is thereby misled to his own injury, 18 I. C. C. R. 299, that is, a shipper is bound by the published rate whatever other remedy he may have for the misrepresentation.

In case of through routing, as the shipper is entitled to the lowest published rate between the points of shipment, the initial

* But for cases where reparation was allowed on showing of special damages by reason of failure to post tariffs, see 18 I. C. C. R. p. 242 and 19 I. C. C. R. p. 108.

carrier is bound to ship via the road having the lowest rate and is liable on claim of reparation to the shipper for failure to do so. 17 I. C. C. R. 443, 18 I. C. C. R. 190. In case the shipper gives instructions as to the route of shipment the initial carrier is justified in following instructions, even though a higher rate applies on such route than was available upon another road between the same points. 12 I. C. C. R. 469, 18 I. C. C. 299. If the shipper is in doubt as to what route provides the lowest rate to the terminal point, he should tender the traffic to the initial carrier without instructions as to the specific route and he is then entitled to the lowest rate. 18 I. C. C. R. 190.

In 17 I. C. C. R. 588, the commission ruled that if an initial carrier files and posts a rate making joint rates from stations upon its lines to destination upon a connecting line in which tariff a connecting line does not occur, the initial line thereby becomes responsible to the shipper under its tariff. If the shipper is compelled to pay under rates legally in effect a greater transportation charge than that named in the tariff, he may recover from the initial carrier the difference, certainly if the rate posted by it is found to be reasonable.

Every carrier party to a joint rate is jointly and severally responsible for that rate, and those carriers who actually participate in the transportation under a joint rate, are jointly and severally liable for damages for unreasonableness of that rate; and a complainant is not deprived of his right to a reasonable rate by the fact that the defendants, through neglect of the rules of the commission as to the publication of their tariffs, had failed to establish that rate in legal form. See also 17 I. C. C. R. 379.

A carrier voluntarily establishing a through rate less than the sum of the locals after a shipment has moved, does not *ipso facto* become liable for the difference between the amount charged and the amount which would have been collected, if the through rate had been in effect at the time of the removal. 17 I. C. C. R. 295.

The same principle applies whether the claim for reparation is made by a shipper or an offer to refund is made by a carrier. Thus, in 17 I. C. C. R. 461, the commission refused to grant leave to a carrier to refund to a shipper the difference between the class rate paid and a reduced commodity rate, though the shipper had been informed by the carrier that the reduced rate

was in force; and, being informed of the correct rate before the shipment, on advice of the carrier the shipper allowed the shipment to go forward on the carrier's agreeing to apply for authority to make the refund. The commission said that to grant the refund in such a case would do away with the published tariff altogether.

Claims of reparation are determined upon the principle of knowledge which the shipper is conclusively presumed to have as to the published rates. In case of through routing it has been held that a carrier is criminally responsible under the Elkins Act (see *infra*, § 422), for failure to observe a through rate with which it participates although it filed no written agreement therein. In such cases the shipper could not be conclusively charged with knowledge of the parties to the through route and rate.

§ 310. Status of carriers as shippers or consignees.—A very considerable volume of the interstate railroad traffic of the country is that of shipments for railroads themselves who may be shippers or consignees. The commission has had occasion in several cases to consider the status of a carrier, which is a shipper or consignee as well as a transporter and the duty and responsibility of other carriers in routing such shipments, and the commission has expressed its view in Rule 225 Conference Rulings Bulletin No. 5 (1909):

“In answer to inquiries the commission expresses the opinion, that under the law a carrier, or a person or corporation operating a railroad or other transportation line, may not, as a shipper over the lines of another carrier, be given any preference in the application of tariff rates on interstate shipments, but it may lawfully and properly take advantage of legal tariff joint rates applying to a convenient junction or other point on its own line, provided such shipments are consigned through to such point from point of origin and are, in good faith sent to such billed destination. In other words, one carrier shipping its fuel, material, or other supplies over the lines of another carrier must pay the legal tariff rates applicable to the same commodities shipped by an individual, but when a carrier is the consignee of a shipment of its own property which moves under a joint rate and is to participate in the haul of same via its own line, routing instructions of consignor to a specified junction point on the line of consignee carrier must be observed. There may be some instances, such as the movement of needed fuel, in which,

in order to keep the trains or boats moving, such traffic could temporarily be given preference in movement without creating unjust or unwarranted discrimination.

“Where stock in one carrier company is owned by another carrier company, but both maintain separate organizations and report separately to the commission, they may not lawfully carry property free for each other.”

For applications of these rulings in cases of misrouting claims against the initial carrier in shipment of property where carrier was the consignee, see 21 I. C. C. R. p. 280, where reparation was awarded for damages resulting from misrouting shipment of lumber. In 21 I. C. C. R. 270, the commission condemned the practice of applying a portion of a joint rate from the point of origin to the point of destination, to-wit, that portion from the point of origin to the junction point, for the use of a particular shipper which is not published for the benefit at large nor filed with the Interstate Commerce Commission under section 6. But the commission said that nothing therein was to be construed as denying the carriers themselves the benefits of through rates on company material according to lawfully published tariffs. In another case, 21 I. C. C. R. 290, it was said that a carrier was liable for damages resulting from a disregard of a shipper's specific routing instructions, even though it sends a shipment via a route taking a lower rate to the originally billed destination, and that it was no part of the carrier's duty to speculate upon the reasons which actuated such instructions and assume that they do not express the shipper's desire. See also 21 I. C. C. R. 270.

§ 311. What is included in schedules.—The section provides for the publication, not only of the charges for carriage, but for a separate statement of terminal charges, storage charges, icing charges and all other charges which the commission may require, all privileges and facilities granted or allowed, or any rules and regulations which in any wise change, affect or determine any part of the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the shipper or consignee.

In the Grand Haven Cartage Case, *supra*, the supreme court said, quoting the opinion of the commission, that cartage was in general a terminal expense, and was not in general assumed

by the carrier. That it was informed by the report of the commission for 1889 that there were many railroad companies throughout the country which furnished cartage at their stations, but that in no instance did the rate sheets or schedules contain anything to that effect. At that time the statute made no such requirement. The court suggested that it was proper for the commission to include the cartage, if furnished, as one of the terminal charges. The commission acted upon the suggestion (see 7 I. C. C. Rep. 592; 8 I. C. C. Rep. 560), and made a general order February 8, 1898, requiring a statement of cartage and other terminal services. For the views of the commission on this subject, see also 10 I. C. C. Rep. 352, and 9 I. C. C. Rep. 1.

As to the requirement of the separate publication of terminal charges, see also *Interstate Commerce Commission v. Stickney*, *supra*, § 153, where it was held by the supreme court that terminal charges for the delivery of live stock at the Union Stock Yards in Chicago, must be separately stated in tariff schedules. See also decision of the circuit court of appeals, seventh circuit, *Walker v. Keenan*, *supra*, where it was held that a railroad could post a schedule for a separate terminal charge of a fixed sum for a car for delivery to the stock yards where located off its own lines.

The requirement of separate schedules is also illustrated in *Baltimore & Ohio R. R. Co. v. Hamberger, et al.*, 155 Fed. 849 (1907), circuit court of Va., where it was held that the failure to insert in the schedule a limitation of non-transferability of passenger tickets, made such a provision in the ticket void, and hence the railroad could not thereafter maintain a suit to enjoin the transfer of the ticket.

§ 312 (237). What is sufficient publication and filing.—Schedules of joint tariffs required to be filed with the commission need not be duplicated by each company which unite in making them. 1 I. C. C. R. 225, 1 Int. Com. Rep. 598. The receipt of a written statement from each company acknowledging the authority for filing the tariff on its behalf is sufficient. The posting of notices in a railroad station, that all rates are on file in the office of the station agent and may be examined on application to the agent, is not sufficient. 7 I. C. C. R. 43. 9 I. C. C. R. 221.

Shippers and consignees cannot depend for the lawful rate and charge upon statements, as they must be guided by the published rates themselves, and the schedules must therefore be sufficient to give the necessary information. 7 I. C. C. R. 255.

The only satisfactory method of publishing rates, 6 I. C. C. R. 488, is to definitely state the charges fixed between points clearly specified, without burdening and confusing the public with the need of making of involved calculations or with analyzing a series of statements to determine whether a particular rate has been changed since the particular tariff was issued. Thus published tariffs specifying rates upon standard articles, as vegetables shipped from Florida, should state plainly the weight or dimensions of the crate to which the rate should apply. 8 I. C. C. R. 585.

Rules or regulations which, if enforced, would result in changing or affecting rates or charges shown on published schedules, must be notified to the public for the time required by law for other rate changes. The notice should set forth the changes proposed to be made in the schedules then in effect, and such changes must be shown by printing new schedules or be plainly indicated upon the schedules in force at the time. 7 I. C. C. R. 255. As to publication and filing of rate schedules, see annual report of commission of 1904, p. 64.

§ 313 (238). Joint tariffs and through rates.—An important change made by the amendment of 1906 was the requirement in the same publication of a joint rate as of separate rates. Prior to this the publication of joint rates had been regulated by orders of the commission, which, by order of March 23, 1889, prescribed that the carriers should publish their joint rates as separate individual roads were required by law to do. See 9 I. C. C. R. 182.

In 1907 (see 12 I. C. C. R. 164) the commission had a hearing at the request of various shippers and railroads with reference to the construction of this amendment of 1906, and particularly with reference to the matter of through rates, which should govern shipments over more than one railroad where no joint rate had been made. (See also report of 1907, p. 75).

The commission ruled that when a through route has been formed, the rate charged is a through rate and the shipment will move upon the rate existing at the time it is billed by the initial carrier. Any increase or decrease made in the through rate after

the date of shipment, is not applicable to such through shipment. A through route is a continuous line of railway formed by an arrangement, express or implied, between connecting carriers. A through bill of lading is conclusive evidence of the existence of a through route, under the principle established in the *Social Circle Case*, 162 U. S. 184, *supra*; *L. & N. R. Co. v. Behlmer*, 175 U. S. 650, *supra*. A through route must have a through rate for every service that it offers. If a through rate is established notice must be given to the world of such arrangement by publication. If no through rate is established over a through route the sum of the locals will make up the rate. 5 I. C. C. R. 44, 3 Int. Com. Rep. 706.

As to jurisdiction of commission, under amendments of 1906 and 1910 to establish through routes without consent of carriers, see *infra*, section 15 of act.

When the rates established applying between the points within a single state are applied as part of combination rates in transportation between different states, such state rates, as well as the interstate rates with which they are combined, must be published and filed as provided by section 6. See also as to application of the section, 8 I. C. C. R. 316.

So passenger excursion rates are required to be published and filed. 3 I. C. C. R. 465, 2 Int. Com. Rep. 729.

§ 314 (129). Responsibility for through rates.—When railroad companies make a through and continuous line and offer it for the use of the public, the commission has ruled that they cannot rid themselves of responsibility for unjust charges by breaking the haul in two and calling themselves carrier of the separate ends of their through line. Through and continuous lines imply through rates, which must be reasonable rates, and suitable instrumentalities of shipment and carriage. 6 I. C. C. R. 378. The commission, in 2 I. C. C. R. 131 and 2 Int. Com. Rep. 78, applied this principle to the Pennsylvania railroad company, which operated a part of a through line and owns a controlling interest in the capital stock of a connecting line, the Pittsburgh, Cincinnati & St. Louis, and the commission ruled that the Pennsylvania Railroad Company could not free itself of the responsibility for the through rates by hiding behind the corporation of the other company as a separate carrier.

The carrier however does not assume responsibility for rates

made by a connecting road because merely of its giving them in connection with its own rates by way of information to parties desiring to make through shipments. 1 I. C. C. R. 401, and 1 Int. Com. Rep. 703. In the absence of some agreement or understanding with a connecting line, by which the joint tariff rates is authorized, the carrier cannot lawfully publish or apply any other rates than those fixed for transportation between the points reached by its railroads, and it cannot publish the sum as a rate to points on the line of another carrier without its consent. Such a through rate is not a joint rate, for joint rates can be made only by concurrence or assent, and it is not a combination rate, for one of its component parts is not a subject for a separate charge. There must be lawful rates for each of the roads before there can be a lawful combination of rates.

It has been held that where the lines of several railroad corporations are conducted as a single system for the purpose of traffic between different points originating on either, and such corporations divide the profits of such business on a mileage basis, the several corporations as to such business are partners liable to third persons on the principles of the law of agency. See *Lehigh Valley R. Co. v. Dupont*, C. C. A. 2nd Circuit, 128 Fed. 840 (1904). But the fact that a railroad company owns stock and bonds of another railroad does not show partnership or agreement to run the roads of the latter on a common account. See *Pennsylvania R. Co. v. Jones*, 155 U. S. 333, 39 L. Ed. 176 (1894).

§ 315 (239). Published joint rates must be duly authorized. The only rates, which a carrier is authorized to publish, are its own local rates, that is, to points on its own line, and such through rates, as it is authorized by agreement with any connecting carrier to combine with the rates of such carrier to points on its line. It cannot lawfully add to the duly established rates of another carrier any amount it pleases less than its own local rates, and publish and use them the same as a through rate to points on the line of another carrier without its consent. Such a through rate is not a joint rate, for joint rates can be made only by concurrence or assent, nor is it a combination rate, for one of its component parts has no legal existence or sanction as a through rate or through charge.

There must be lawful rates upon each of the roads before there can be a lawful combination of rates. This was ruled in a case, 7 I. C. C. R. 323, where the receivers of a road connecting with the New York, New Haven & Hartford railroad, published what purported to be a joint tariff of coal rates from the point on its road to a number of destinations reached by the New York & New Haven road, whereby the complainant company received its full local charges to said destinations from the junction points with defendant's road, and the defendant accepted the remainder, which was in each instance less than the established local rate from the place of shipment to the point of connection. The New York & New Haven road which carried coal to the same destinations by a longer route over its own rails thereby securing greater compensation than was afforded to it by coal coming to it from defendant's road, refused to unite in these rates published by the connecting carriers so unauthorized and its complaint was sustained. Commissioner Clemens dissented, saying that a carrier could make and publish through rates to points on a connecting line less than its regular locals, provided the rates on its own line were duly filed and published and were themselves just and reasonable and are not in themselves unjustly discriminative against local shippers.

§ 316. The commission's power of modification as to filing of tariffs.—The proviso allowing the commission to allow changes in rates less than a thirty days' notice, and to modify the requirements of the section as to posting and filing tariffs, either in particular instances or by a general order, applicable to special instances, on good cause shown, was inserted in the amendment of 1906, because it was found that a literal enforcement of the "posting" provisions and of the thirty day notice in the matter of import and export rates and of special excursion rates, would be impracticable. It was not clear that the excursion rates under section 22 were changes under this clause but the commission ruled that they were so subject. The commission made an exhaustive investigation upon the subject of import and export rates (see 10 I. C. C. Rep. 55), and there said that the practical difficulty arose from the fact that ocean rates from the ports are not under the control of the commission and

are constantly varying; that the rate varied from day to day, and sometimes from hour to hour. The same kind of merchandise may be carried in the same vessel, even for the same person, at different charges for the transportation. See the full discussion of this subject in the report of the commission for 1904, page 49. The purpose of this proviso was therefore to make the section adaptable to commercial conditions and environments. See annual report for 1905, page 8.

SECTION 7.

§ 317. Continuous carriage of freights from place of shipment to place of destination.

318. Judicial application of section.

§ 317 (241). Continuous carriage of freights from place of shipment to place of destination.—SEC. 7. That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage or interruption made by such common carrier shall prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this act.

§ 318 (242). Judicial application of section.—This section which has not been amended prohibiting any combination for preventing the continuity of traffic and providing for the continuous carriage of freights from the place of shipment to the place of destination, is to be considered in connection with the provision of section 3 concerning the interchange of traffic (*supra*, § 278), which has been construed as leaving the carriers free to make arrangements for through traffic among themselves. It was said by the commission in a case, 10 I. C. C. R. 188, that in view of this construction of section 3 of the act, it was not clear what the seventh section was intended to accomplish, and that possibly congress had in mind that railways might attempt to interrupt traffic at state lines, thereby depriving the traffic of the character of interstate business, and that the seventh section may have been intended to prevent this. The commission was clear that it added nothing to the third section in support of the claim made requiring the defendant carrier to deliver its cars to another carrier.

This section has also been cited in the cases wherein the courts have been asked to protect interstate carriers against interference by unlawful combinations. See chapter VI, *supra*.

SECTION 8.

§ 319. Liability of common carriers for damages.

320. Right of action based on the statute.

321. Plaintiff must show injury.

322. Allowance of attorney's fee as costs.

323. Limitation of actions.

324. Assignability of claims.

325. The jurisdiction of federal courts.

326. Jurisdiction of the federal courts in equity under the act.

327. Jurisdiction in equity for protection of interstate commerce.

§ 319 (243). Liability of common carrier for damages.—
Sec. 8. That in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

§ 320 (244). Right of action based on the statute.—Section 8 and succeeding section 9 which have not been amended, provide for private actions at law for damages by persons injured by violations of the provisions of the act, and are the only provisions of the act directly relating to such private actions in the courts. Their importance is very much qualified by the construction given to the remedial features of the act under the amendments of 1906 and 1910 by the recent decisions of the supreme court, see section 9, *infra*. Some of the cases cited under this section were decided prior to these amendments, and the judicial construction of the act following thereon. These sections were construed in *Parsons v. C. & N. W. R. Co.*, 167 U. S. 447, 42 L. Ed. 231 (1897), affirming 11 C. C. A. 489, 63 Fed. 903, an action for alleged discrimination in shipping grain from Iowa to Chicago on account of differential rates granted to shippers from Nebraska. The court said that the cause of action was based entirely on the statute, and to enforce what was in its

nature a penalty imposed on account of the wrongful conduct of the defendant. One who is seeking to recover a penalty is bound by the rules of strict law, as no violation of the statutes was to be presumed and he must make out a case showing not by way of inference, but clearly and directly, such violations. Such a suit was distinguished from the case of a party who had been charged and compelled to pay an unreasonable rate. The right of a shipper, who pays reasonable rates, to recover from such company the excess of such payment over the rates charged to shippers of similar goods to the same destination from another place of shipment for the same or greater distance from it, is a right growing out of the Interstate Commerce Act, and being in the nature of a penalty, can be enforced only by strict proof showing clearly and directly the violations complained of.

§ 321 (245). Plaintiff must show injury.—Under this section the common carrier is liable only to the person or persons injured thereby for the full amount of damages sustained in consequence of the violation of the act. The supreme court said in the case cited that as the only right of recovery given by the act to the individual was for the amount of damages sustained, the party, before he can recover under the act, must show not merely the wrong of the carrier, but that the wrong has operated to his injury. Thus it is not sufficient to show the failure to publish the tariff rates, as provided by section six, but it must be further shown that this non-publication operated to his injury. Penalties are not recoverable on mere possibilities.

The discriminating rate must be actually charged to make an offense or cause of action under the act. Merely making or offering an illegal rate when it is not shown that an actual shipment was made, constitutes no legal injury to a shipper who was charged a higher rate. *Lehigh Valley R. Co. v. Rainey*, 112 Fed. 487 (1902), E. Dist. of Penn.

It was held in *Junod v. C. & W. R. Co.*, 47 Fed. 290 (1891), that where plaintiff is entitled to the same rate for the shorter as is afforded other shippers for the longer haul, the measure of damages is the difference between the amounts paid by each for like services, and that it is for the jury to determine whether

they will allow interest on the damage; but if it is awarded, it should be estimated from the date of the last shipment.

§ 322. Allowance of attorney's fee as costs.—In *Atlantic Coast Line R. R. Co. v. Riverside Mills*, 219 U. S. 186, 55 L. Ed. — (1911), it was held by the supreme court that the allowance of an attorney's fee, taxable as costs under this section, does not apply in case of an action by a shipper against an initial carrier for loss on a connecting line, wherein the carrier's liability is dependent upon the so-called Carmack Amendment of 1906 to sec. 20, since the cause of action in such case is the loss of property which is in no way traceable to a violation of the provisions of the statute (affirming with modification 168 Fed. 990). See § 407, *infra*.

§ 323 (246). Limitation of actions.—The Interstate Commerce Act prescribes no limitation of time within which actions based thereon shall be instituted, and therefore, under R. S., U. S. 721, the statute of limitations of the state in which the action is brought must apply and control. *Michigan Insurance Bank v. Eldred*, 130 U. S. 693, 32 L. Ed. 1080 (1889). This was directly ruled in *Rattican v. Terminal Railroad Association*, 114 Fed. 666 (1902) (E. Dist. of Mo.), and in *Copp v. Louisville & Nashville R. Co.*, 50 Fed. 164 (1891), Dist. of Ky.; *Murray v. Railroad Co.*, 35 C. C. A. 62, 92 Fed. 868 (1892). In both cases the state statutes of limitations were held to apply. Where under the statute of a state the defense of the statute of limitations can be invoked by the defendant by demurrer, the same procedure will apply in the federal court. It was ruled in the Missouri case, that an action to recover damages for a discrimination in violation of section 2 was one to recover money in the nature of a penalty, and therefore must be brought within the time allowed by the state statutes for such action. In this case the court held, that the allegations of the petition were not sufficient to prevent the running of the statute, as there was no allegation that plaintiff believed and relied on defendant's announcement, that it made no discrimination in the rates, or that he exercised diligence to ascertain the facts. In action at common law, not founded on the statute, to recover unreasonable charges, the unreasonableness being

established by the payment of rebates, it has been held that the statute of limitation did not begin to run against the shipper as long as he had no knowledge of his rights owing to the fault of the carrier in concealing the facts. See *Cook v. C., R. I. & P. R. Co.*, 81 Iowa, 551, 9 L. R. A. 764 (1890).

As to the limitations governing proceedings for reparation before the commission, see *infra*, section 16.

§ 324 (247). **Assignability of claims.**—Claims for damages under sections 8 and 9 constitute property rights, which may be assigned, so as to convey the beneficial interests to the assignee; and suits brought in the United States circuit court under these sections are maintainable in the name of the assignee under provisions of the law of the state, requiring all suits to be brought in the name of the real party in interest. *Edmunds v. Illinois Central R. Co.*, 80 Fed. 78 (1897).

In *Pennsylvania R. R. Co. v. International Coal Mining Co.*, *supra*, it was held that a pending action to recover damages for discrimination in violation of section 2, is not abated by a judicial sale of plaintiff's corporate property, including the choses in action in such suit; and proof of such sale constitutes no defense to the action.

§ 325 (248). **The jurisdiction of federal courts.**—It is specifically provided in section 9 that a person claiming to be damaged by any common carrier subject to the provisions of the act may at his election make complaint to the commission, or may bring suit in any district or circuit court of the United States of competent jurisdiction. It follows that the jurisdiction of the federal court when invoked is not based upon diverse citizenship, but on a cause of action arising under the laws of the United States. Diverse citizenship therefore is not necessary to jurisdiction of the federal court.

In *Van Patten v. C., M. & St. P. R. R. Co.*, 74 Fed. 981 (1896), it was decided by Shiras, J., of the northern district of Iowa, that the limitation as to the district in which suit may be brought in the United States circuit court contained in the Judiciary Act of 1887 and 1888, did not apply to suits brought under sections 8 and 9 of the Interstate Commerce Act, but that such suits may be brought in any district in which the

defendant may be found, as the limitations contained in those acts are applicable only to the cases whereof the state and federal courts have concurrent jurisdiction, citing *In re Horhorst*, 150 U. S. 653, 37 L. Ed. 1211. It was said in the same case that the jurisdiction under these sections was exclusive in the courts of the United States, as the use of the words in section 9 concerning certain courts in the United States indicated that in the view of congress there were courts in the United States who were competent to take jurisdiction over such cases as arise under the provisions of the act, and courts not competent to take jurisdiction. But see *Connor v. V. & M. R. Co.*, 36 Fed. 273 (1888); *Lowry v. C. B. & Q. R. R. Co.*, 46 Fed. 83 (1888).

In *Swift v. Railroad Co.*, 58 Fed. 858 (1893), it was held that a court had no jurisdiction over a suit under the act, removed from a state court, where the state court had none. This did not apply where a state court had jurisdiction of the cause of action stated in the petition, but a federal question was raised in the answer, which set up an alleged discrimination violative of the act. See also *Sheldon v. Wabash Railroad Co.*, 105 Fed. 785 (1900).

The exclusiveness of the jurisdiction over suits brought under these remedial sections of the act to enforce its provisions must be distinguished from the concurrent jurisdiction of the state court over questions in interstate commerce, not arising from or based upon the act. *Murray v. Railroad Co.*, 62 Fed. 24 (1894). See *supra*, § 44.

§ 326 (249). Jurisdiction of the federal courts in equity under the act.—The general chancery jurisdiction of the circuit courts of the United States in cases arising under the Interstate Commerce Act was sustained by the supreme court in the *Lennon Case*, 166 U. S. 548, 41 L. Ed. 1110 (1897). The court held that a bill brought solely to enforce compliance with the Interstate Commerce Act, and to compel railroad companies to comply with such act, and to offer proper and reasonable facilities for the interchange with the complainant and enjoining them from refusing to receive from complainant for transportation over their lines any cars which might be tendered, made a case arising under the constitution and laws of the United States, of which

the circuit courts had jurisdiction. A case arises under the constitution and laws of the United States whenever the plaintiff sets up a right which the parties had denied to him, and the correct decision of the case depends upon the construction of such laws.

In *Central Stockyards Co. v. L. & N. R. Co.*, 112 Fed. 823 (1902), which was a proceeding to enforce by injunction rights claimed under section 3 of the act, the court, though deciding against the plaintiff on the merits, was of the opinion that the remedies provided in section 9 were exclusive for remedies at law, where the parties did not apply in the first instance to the Interstate Commerce Commission and that a bill for injunction to enforce obedience to the section would not lie. The supreme court however in affirming the judgment, assumed, without deciding, that such rights as plaintiff had, could be enforced by bill in equity. See 192 U. S. 568, 48 L. Ed. 565 (1904).

In *Interstate Stockyards Co. v. Indianapolis U. R. Co.*, 99 Fed. Rep. 472, the circuit court of Indiana sustained the jurisdiction in equity, saying that where a wrong was continuing in character and not susceptible of accurate pecuniary estimation and resorts to actions at law would involve a multiplicity of suits, none of which would end the litigation, a resort to equity was proper.

In the case of *Missouri Pacific Railway Co. v. United States*, 189 U. S. 774, 47 L. Ed. 811 (1903), the supreme court held that prior to the passage of the act of February 19, 1903, *infra*, § 422, known as the Elkins Law the district attorney of the United States under the direction of the attorney general in pursuance of a request made by the commission, was without power to commence a proceeding in equity against a railroad corporation to restrain from discriminating in its rates between different localities (Justices Brewer and Harlan dissenting). This amendatory act provides for equity jurisdiction in such cases where proceedings are instituted at the instance of the Interstate Commerce Commission but makes no change in the law so far as to the remedies open to private individuals.

The general chancery jurisdiction has been sustained in several cases in the federal circuit courts where it was invoked by both railroads and shippers for the enforcement of rights under the act. For the equity jurisdiction in protection of

rights in interstate commerce under the decisions of United States supreme court holding that resort must be had to the Interstate Commerce Commission, where the matters are within the jurisdiction of that body. See *infra*, § 330. The radical change effected by those decisions in the right to resort to the courts without going before the commission makes it unnecessary to recite the different decisions of the circuit courts prior thereto.

§ 327 (250). Jurisdiction in equity for protection of interstate commerce.—In another class of cases, jurisdiction in equity has been successfully invoked not only by the United States, as in the Debs Case, 158 U. S. 564, but by railroad companies for the protection of interstate commerce against unlawful combinations preventing the performance by such railroad companies of the duties imposed upon them by the statute. Thus in Toledo, A. A. & N. W. R. Co. v. Pennsylvania Company, 54 Fed. 730 (1893), Judge Taft in the northern district of Ohio, sustained the equitable jurisdiction in a suit filed against several railroad companies connecting with complainant company at Toledo, and asking an order enjoining the companies from refusing to receive and deliver complainant's freight, such refusal being threatened on the ground that the locomotive engineers of the defendants refused to handle trains containing such freight because the complainant employed on its line engineers who were not members of their brotherhood. The court sustained the jurisdiction irrespective of citizenship, saying it was immaterial what rights the complainant would have had before the passage of the Interstate Commerce Act. "It was sufficient that congress in the exercise of constitutional power had given a positive sanction of the federal law to the rights secured in the statute, and any action involving the enforcement of those rights was a case arising under the laws of the United States." See also *Ex parte Lennon*, 166 U. S. 548, *supra*.

The court also held that a mandatory injunction was a proper remedy to restore the passage of freight backwards and forward, as each carrier had the right to enjoy this without interruption.

SECTION 9.

- § 328. Right of election in appealing to commission or the court.
329. The limitation of the right of private action in the courts.
330. Jurisdiction in equity under the act as amended.
331. Action for damages on account of discrimination.
332. Judicial application of section.

[Persons claiming to be damaged may elect whether to complain to the Commission or bring suit in a United States court.]

§ 328. Right of election in appealing to commission or the court.—SEC. 9. That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages, the court before which the same shall be pending may compel any

[Officers of defendant may be compelled to testify.]

director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

§ 329. The limitation of the right of private action in the courts.—While sections 8 and 9 of the act, which specifically provide for a remedy at the choice of the shipper either by appeal to the commission or to the courts by private action against the carrier, have remained unchanged through the successive amendments, the general scope of the act has been so radically changed by these amendments and the powers of the commission thereunder have been so materially enlarged that the judicial construction of these sections as to the jurisdiction

of the courts to entertain private actions under the act has been profoundly affected thereby.

In *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 246, 51 L. Ed. 553 (1907), plaintiff brought suit in a state court in the state of Texas to recover because of the exaction by the carrier on an interstate shipment of an alleged unreasonable rate, although the rate charged was that stated in the schedules duly filed and published in accordance with the act. The court held that the relief prayed was inconsistent with the act to regulate commerce, since by that act the rates so filed were controlling until they had been held to be unreasonable by the Interstate Commerce Commission on a complaint made to that body. In this case the court held that the independent right of the individual to maintain actions to obtain pecuniary redress for violations of the act under sections 9 must be confined to such wrongs, as are consistent with the context of the act to be redressed without previous action of the commission; and that the provision of section 22, *infra*, expressly preserving the common law and statutory remedies, could not be construed as continuing for shippers the common-law right, the continued existence of which will be absolutely inconsistent with the provisions of the statute.

The suit in this case was brought in the state court, but the conclusion of the court did not depend upon that, as the reasoning would apply equally to a suit brought in the circuit court of the United States. See also *Cisco Coal Case*, 204 U. S. 449, 51 L. Ed. 552 (1907).

This ruling in the *Abilene Cotton Oil Case* was reaffirmed in *B. & O. R. Co. v. United States*, 215 U. S. 481, 54 L. Ed. 292 (1910), in a case involving the remedy of mandamus specifically provided under section 23; and the court said that it was settled in the *Abilene case* that the right to question in the courts the rates established in accordance with the act to regulate commerce, without previous resort by complaint to the commission in order to determine their unreasonableness, would be destructive of the act, and therefore was not permissible. The court said in its opinion that the *Abilene Case* was decided before the amendment of 1906 and that the construction given in that case was made the more imperative by these later amendments of 1906, as the commission is now empowered, and it is made its duty, in disposing of the complaints, not only to determine the illegal-

ity of the practices alleged to give rise to an unjust preference or undue discrimination, and to forbid the same, but moreover to direct the practice to be followed as to such subject for a future period not exceeding two years, the order to become operative without judicial action. The court therefore said that the primary interference of the courts with the administrative functions of the commission was wholly incompatible with the act.

The court said there was nothing in the case of *Southern Railroad Company v. Tift*, 206 U. S. 428, *infra*, which qualified the ruling of the *Abilene Case*. See also section 23, *infra*. This ruling has been followed in several of the circuit courts. See *Howard Supply Co. v. Chesapeake & Ohio R. Co.*, 162 Fed. 188, where the court held that the plaintiff had no right to sue in the circuit court for damages for an alleged overcharge until the commission had passed upon the matter, although the rate charged was higher than the former rate passed on by the commission and held unreasonable.

In *Clement v. L. & N. R. Co.*, 153 Fed. 979 (1908), the circuit court (E. D. of La.), held that the action by a shipper to recover damages because of an alleged discrimination in exacting a charge from one class not required from another class for the same service, was not within the jurisdiction of the court as a case arising under the Interstate Commerce Act, where it is not alleged that the charge was not in accordance with the schedule of rights in interstate commerce, whether private or public, has been made to the commission to correct the alleged discrimination.

§ 330. Jurisdiction in equity under the act as amended.—The general jurisdiction of courts in equity for the protection of rights in interstate commerce, whether private or public has been considered in the cases cited under the previous section.

There has been a difference of judicial opinion since the decision of the supreme court in the *Abilene Cotton Oil case*, *supra*, as to the jurisdiction of the courts under the law there declared to grant any equitable relief in relation to matters which were within the jurisdiction of the commission.

In *Southern Railway Co. v. Tift*, 206 U. S. 428, 51 L. Ed. 1124, decided in 1907, though the original suit was filed in 1903, the court affirmed the decree of the circuit court of appeals, fifth circuit, 138 Fed. 753, affirming an injunction granted by the cir-

cuit court, southern district of Georgia, enjoining an interstate carrier from enforcing an increased freight rate on lumber. The railroad had filed a demurrer to the bill for want of jurisdiction which was overruled; but the court made an order that the complainant should make a proper application to the Interstate Commerce Commission, and the court would then entertain a renewed application on the record as made. Application was made to the commission, which found that the advance was unreasonable; and thereupon, upon that record, the court enjoined the enforcement of the advance. The parties had made a stipulation that in the subsequent proceedings in the court the circuit court could adjudge the amount of reparation to be made. The final decree in the circuit court directed an order of reference with instructions to ascertain the amount of increase in rates paid since the rate went into effect.

Referring to the Abilene case, the court said:

“We are not required to say, however, that because an action at law for damages to recover unreasonable rates which have been exacted in accordance with the schedule of rates as filed is forbidden by the Interstate Commerce Act a suit in equity is also forbidden to prevent the filing or enforcement of a schedule of unreasonable rates or change to unjust or unreasonable rates.”

These decisions of the supreme court have been considered by the circuit court of appeals in the second, fourth, fifth, seventh and ninth circuits, and varying conclusions reached as to the jurisdiction of the circuit court to grant an injunction against an increase of rates before or pending an investigation by the commission. Thus, while the power to grant such an injunction was sustained in the ninth circuit in *Northern Pacific Ry. Co. v. Pacific Coast Lumber Mfg. Ass'n*, 165 Fed. 1, in October, 1908 (Judge Ross dissenting), affirming the circuit court of Washington, on same day, in the *Kalispel Lumber Co. Case*, 165 Fed. 25, an injunction order was reversed, where the rates had been filed and gone into effect, the court saying that the thirty days' notice required to be given of a change in schedules gave ample time for invoking the aid of equity if irreparable injury would result from their being put into effect. On the other hand, the circuit court of appeals of the fifth circuit, in *Atlantic Coast Line v. Macon Grocer Co.*, 166 Fed. 206 (1909), reversed the circuit court (163 Fed. 738), in granting a temporary

injunction and ordered a dismissal of the bill, Shelby, J., dissenting. The court said that a decree in equity would work incalculably greater mischief in interfering with the statutory rates than would an action at law. The same ruling was made in the fourth circuit (*Columbus I. & Steel Co. v. Kanawha & N. Ry. Co.*, 178 Fed. 261, affirming 171 Fed. 173), in February 1910; and these cases were followed by the court of appeals of the second circuit in *Wickwire Steel Co. v. New York Central Co.*, 181 Fed. 316, June 1910. In this case the order which was reversed, restrained defendants from promulgating a proposed schedule through the commission and from putting it into effect pending the determination of the reasonableness of the rate by the commission, the complainant being required to file bond to indemnify defendants from loss in case the commission found the rate to be reasonable.

In *Jewett Bros. v. C. M. & P. Ry. Co.*, 156 Fed. 161, in 1907, southern district of Dakota, it was held by Garland, J., that the court could not grant a temporary injunction to restrain a carrier from putting into effect an alleged unlawful rate, where the suit was merely in aid of a proceeding before the commission, since the commission was without power to pass upon a rate which was merely proposed by a carrier.

In *Sandusky-Portland Cement Co. v. B. & O. R. Co.*, in the circuit court of appeals of the seventh circuit, 187 Fed. 583 (1911), the complainant sought to enforce a contract whereunder the railroad company agreed under the consideration of his establishing a cement factory on its line of a certain capacity, that the railroad's regular established tariff rates on cement during a specified period should not exceed those made out in the schedule. The court refused to grant relief saying that the Interstate Commerce Commission was charged with the unitary administration of interstate regulations and that the court could not grant relief, in advance of a finding by the commission on an issue whether the rates were reasonable or unreasonable to be obtained in the light of the railroad's operations as an entirety. The court said that the Interstate Commerce Commission superseded a primary jurisdiction over all other tribunals upon the question of facts arising upon interstate rates.

It should be observed, however, that these decisions excepting the last cited were rendered prior to the amendment of 1910,

which enlarges the power of the commission in the very matter in which the temporary injunctions were sought to prevent irreparable injury pending the investigation by the commission, as now the commission is empowered to suspend an increase of rates for a stated period for the purpose of investigating their reasonableness. The principle discussed in these cases would seem not to apply where the aid of the court is sought to enforce the performance of a duty by a carrier imposed by general law and therefore not within the duty of the commission as specified in the act. Thus, in *L. & N. R. Co. v. F. W. Cook Brewing Co.*, 172 Fed. 117 (1909), circuit court of appeals seventh circuit, where the court had jurisdiction of the parties and the suit was brought to compel the carrier to carry intoxicating liquors into a district where the sale was prohibited by law, the court held that an application of the statute to shipments from other states was void as an attempted regulation of interstate commerce and that such a case was not one for submission to the commission, and that the court had jurisdiction to entertain the same.

It would therefore follow from the rulings of the supreme court and the reasoning whereon the decisions are based, that there can be no resort to the courts whether in law or equity, if the subject matter of the complaint is within the jurisdiction of the commission and can be there determined under the procedure provided in the act; but if the aid of the court is required in furtherance of the jurisdiction of the commission or the protection of property rights pending such determination, or if any of the common law duties of the carrier are sought to be enforced on any of the recognized grounds of equitable cognizance, such as the prevention of irreparable wrong, the jurisdiction of equity would be sustained.

§ 331. Actions for damages on account of discrimination.—
In *Morrisdale Coal Co. v. Pa. R. Co.* circuit court of appeals third circuit, 183 Fed. 929, Nov. 1910, affirming 176 Fed. 748, it was held that a party claiming to be injured by a discriminating rule for the distribution of coal cars in time of shortage by an interstate railroad could not maintain an action at law for the recovery of damages, although the action was commenced more than two years after the discrimination had ceased, until the Interstate Commerce Commission had investigated the case and determined by its report that the rule is and was discrimina-

tory; that the effect of the Interstate Commerce Act under the construction of the supreme court in the Abilene Case was not merely to suspend the right of a shipper to maintain an action at law to recover damages resulting from an unreasonable rate or discriminating regulation, while such rate or regulation remained in force, but to supersede the right entirely, and the shippers' independent right of action was not revived by the abolition of the unlawful rate or regulation.

The commission had ruled, *infra*, § 387, that it had no jurisdiction to make awards of general damages in cases of discrimination other than damages measured by the difference in rates and that such damages should be left to be determined by action of the court. In this case the court alluded to this report of the commission and intimated that the letter of the statute seemed to confer upon the commission the power to assess damages in every case of discriminatory practice. The court said further that it did not pass upon the question, whether after the commission had found such a rule to be discriminatory, it was its the commission's duty to assess the damages or whether they were to be recovered by an action in some court without any preliminary assessment by the commission.

For a case wherein the same court affirmed a judgment for damages on account of discrimination in rates by the giving of rebates to competitors, wherein the question of jurisdiction pending the action of the Interstate Commerce Commission does not seem to have been raised, see *Pa. R. Co. v. International Coal Mining Co.*, 173 Fed. 1 (October, 1909). The *Morrisdale Coal Company Case* above cited was followed by the circuit court *E. D. Penn.*, 183 Fed. 908 (January 4, 1911), in the case of *Mitchell Coal & Coke Co. v. Pa. R. Co.*, where the court held that it had no jurisdiction where the complaint was founded upon the defendant's practice of granting rebates to the defendant's competitors affecting not only the plaintiff but other shippers in the same region. It was a regulation or practice affecting rates, and the fact that it may have ceased did not affect the primary jurisdiction of the Interstate Commerce Commission.

In another case in the same circuit, *American Union Coal Co. v. Pa. R. Co.*, 159 Fed. 278 (February, 1908), the distinction above mentioned between a discrimination against an individual and a class of shippers was illustrated in a ruling of the court

upon demurrer. The first count claimed damages for an alleged violation of the second section of the Interstate Commerce Act for discriminating against plaintiff in charging the full tariff rates and permitting its competitors by a device to transport their coal at a lower rate. This count was held good, while other counts in the same petition, claiming damages for alleged conspiracy in charging the tariff rates which were posted and filed with the Interstate Commerce Commission, were held bad on demurrer; and treble damages were also asked under the Sherman Anti-Trust Act for alleged conspiracy; but the court held that these second and third counts were bad as there was no right of action either under the anti-trust act or the Interstate Commerce act for a readjustment of tariff rates filed and posted other than through the Interstate Commerce Commission; and there was no allegation that the rates had been found unreasonable by the Interstate Commerce Commission.

It follows, therefore, that where the action requires the determination of the unreasonableness of a rate or of a regulation in interstate commerce whereof the commission has jurisdiction under the act, the action cannot be maintained until the prior determination by the commission of the unreasonableness of such rate or regulation. On the other hand, if the action does not require such a determination, but seeks to recover for a discrimination in rates where the measure of damages is the difference between the amount paid by plaintiff and that paid by others under substantially the same circumstances and conditions during the same time, and in such case there is no occasion to resort to the commission, as there is no question to submit to them, the action at law is maintainable. See *Pa. R. R. v. International Coal Mining Co.*, *supra*. Redress for such a wrong, therefore, in the words of the supreme court, would be consistent with the context of the act to be redressed without previous action by the commission. The distinction is illustrated in the Pennsylvania cases above cited.

§ 332 (252). **Judicial application of section.**—See notes in section 8, *supra*. The provisions in this section for the compelling of testimony and the production of books and papers were in effect held unconstitutional by the decision of the supreme court in the case of *Hitchcock v. Cushman*, *infra*, section 12, in that the protection given to the witness forced to give self-

incriminating testimony was not sufficient under the fifth amendment of the constitution. The act of 1893, *infra*, section 12, only related to testimony given before the commission and did not apply to this section. This, however, was remedied by the act of 1903. See *infra*, § 347.

The case of Webster Coal & C. Co. v. Cassatt, 207 U. S. 181, 52 L. Ed. 160 (1907), an action for damages (see 150 Fed. 32, 50), came before the supreme court on a writ of error involving the production of books and papers, and the court held that the order was insufficient to support the writ, and the merits of the original action were not considered.

A final order of the Interstate Commerce Commission and remaining of record in full force and effect is a bar in the United States circuit court to a suit brought for the recovery of damages alleged to be sustained by plaintiff from the same acts complained of in the statement before the commission. See Riddle v. New York, Lake Erie & Western Railroad Co., U. S. Circuit Court W. Dist. of Penn., 3 Int. Com. Rep. 230.

A party is not barred from prosecuting an action in court for an individual claim because of proceedings instituted before the commission by an association of which he is a member, where it does not appear that the association presented a claim for the plaintiff to the commission. Junod v. C. & N. W. R. Co., 47 Fed. Rep. 290.

It appears from the discussion in congress that the purpose of this provision of the section, that a party must elect whether to proceed before the commission or in the court, was intended to prevent a party from using the commission merely as a means of procuring evidence for a suit in court.

Under this section suit may be brought in any circuit court or district court of the United States. Under the Anti-Trust Act of 1890 the jurisdiction is limited to the circuit court. In New Mexico v. Baker, 196 U. S. 432, 49 L. Ed. 540 (1905), the question was suggested, though not decided, whether either under the Interstate Commerce Act or the Anti-Trust Act of 1890 a suit could be brought in a territorial district court, or whether congress intended that only courts of the United States invested by the third article of the constitution with the judicial power of the United States should have original jurisdiction in such suits.

SECTION 10.

- § 333. Penalties for violations of act by carriers.
- 334. Amendments to the section.
- 335. The amendment of 1903.
- 336. Illegal combinations under section 10.
- 337. The incidental interference with commerce by a peaceable strike not a violation of the section.
- 338. Construction of the statute.
- 339. Removal of indicted persons to other districts for trial.
- 340. Limitation of criminal prosecution under the act.

[Penalties for violations of Act by carriers or when the carrier is a corporation, its officers, agents, or employees: Fine and imprisonment.]

§ 333. Penalties for violations of act by carriers.—Sec. 10. (*As Amended March 2, 1889, and June 18, 1910.*) That any common carrier subject to the provisions of this act, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver trustee, lessee, agent, or person acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall willfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter, or thing in this act prohibited or declared to be unlawful, or who shall aid or abet therein, or shall willfully omit or fail to do any act, matter, or thing in this act required to be done, or shall cause or willingly suffer or permit any act, matter, or thing so directed or required by this act to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this act for which no penalty is otherwise provided, or who shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed five thousand dollars for each offense. *Provided*, That if the offense for which any person shall be convicted as aforesaid shall be an unlawful discrimination in rates, fares, or charges for the transportation of passengers or property, such person shall, in addition to the fine hereinbefore provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court.

[Penalties for false billing, etc., by carriers, their officers or agents: Fine and imprisonment.]

Any common carrier subject to the provision of this act, or, whenever such common carrier is a corporation, any officer or agent thereof, or any person acting for or employed by such

corporation, who, by means of false billing, false classification, false weighing, or false report of weight, or by any other device or means, shall knowingly and willfully assist, or shall willingly suffer or permit, any person or persons to obtain transportation for property at less than the regular rates then established and in force on the line of transportation of such common carrier, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding five thousand dollars, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense.

[Penalties for false billing, etc., by shippers and other persons: Fine and imprisonment.]

Any person, corporation, or company, or any agent or officer thereof, who shall deliver property for transportation to any common carrier subject to the provisions of this act, or for whom, as consignor or consignee, any such carrier shall transport property, who shall knowingly and willfully, directly or indirectly, himself or by employee, agent, officer, or otherwise, by false billing, false classification, false weighing, false representation of the contents of the package or the substance of the property, false report of weight, false statement, or by any other device or means, whether with or without the consent or connivance of the carrier, its agent, or officer, obtain or attempt to obtain transportation for such property at less than the regular rates then established and in force on the line of transportation; or who shall knowingly and willfully, directly or indirectly, himself or by employee, agent, officer, or otherwise, by false statement or representation as to cost, value, nature, or extent of injury, or by the use of any false bill, bill of lading, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to be false, fictitious, or fraudulent, or to contain any false, fictitious, or fraudulent statement or entry, obtain or attempt to obtain any allowance, refund, or payment for damage or otherwise in connection with or growing out of the transportation of or agreement to transport such property, whether with or without the consent or connivance of the carrier, whereby the compensation of such carrier for such transportation, either before or after payment, shall in fact be made less than the regular rates then established and in force on the line of transportation, shall be deemed guilty of fraud, which is hereby declared to be a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction, within the district in which such offense was wholly or in part committed, be subject for each offense to a fine of not exceeding five thousand dollars or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court:

Provided, That the penalty of imprisonment shall not apply to artificial persons.

[Penalties for inducing common carriers to discriminate unjustly: Fine and imprisonment. Joint liability with carrier for damages.]

If any such person, or any officer or agent of any such corporation or company, shall, by payment of money or other thing of value, solicitation, or otherwise, induce or attempt to induce any common carrier subject to the provisions of this act, or any of its officers or agents, to discriminate unjustly in his, its, or their favor as against any other consignor or consignee in the transportation of property, or shall aid or abet any common carrier in any such unjust discrimination, such person or such officer or agent of such corporation or company shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding five thousand dollars, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense; and such person, corporation, or company shall also, together with said common carrier, be liable, jointly or severally, in an action to be brought by any consignor or consignee discriminated against in any court of the United States of competent jurisdiction for all damages caused by or resulting therefrom.

§ 334. **Amendments to the section.**—This section as originally enacted contained only the general penalty clause in the first paragraph. By the amendment of March 2, 1889, the substance of the remainder of the section was added, including specific penalties for false billing, classification, etc., recommended by the commission. The amendment of 1910 specifically included corporations.

§ 335. **The amendments of 1903.**—In the original act and until the enactment of the Elkins Law of 1903, this section contained all the provisions relating to criminal responsibility for violation of the provisions of the Interstate Commerce Act. Very important amendments were made by the act of February 19, 1903, or Elkins Act, *infra*, § 422, which in view of the multitude of prosecutions for rebating, has become of great importance in the enforcement of the act. Under the original Elkins Act, the penalty of imprisonment was abolished, and the only penalties for offenses, whether committed before or after the passage of the Elkins Act, was the imposition of fines, which

were limited from a minimum of one thousand dollars to a maximum of twenty thousand dollars. By the amendment of 1906, this penalty of imprisonment was restored. For the construction of the Elkins Act, see *infra*, § 423 *et seq.*

§ 336 (256). Illegal combinations under section 10.—The most important application of section 10 has been made in connection with labor combinations, and attempted boycotts of interstate railroad traffic by employees of other interstate railroads on account of strikes among classes of employees of such railroads. The law of conspiracy has been invoked under section 5440 R. S. U. S., which provides that if two or more persons conspire to commit an offense against the United States, and one or more of such parties do any act to effect that object for the conspiracy, all parties to the conspiracy shall be liable to the penalty prescribed. (*Supra*, chapter VI.) See *United States v. Stephens*, 44 Fed. 132 (1890), where the statute was applied to the case of a conspiracy to commit acts made misdemeanors by section 13 of the Census Act.

In the case of *Toledo, A. A. & N. W. R. Co. v. Pennsylvania Co.*, 54 Fed. 730 (1893), the court, Taft, J., held that Rule No. 12 of the Brotherhood of Locomotive Engineers, then in force, declaring that the handling of the property of a railroad, when the brotherhood was at issue with such company, was in violation of the obligation of the brotherhood, constituted a combination to induce the violation of section 3 of the Interstate Commerce Act, providing for the interchange of facilities by railroads engaged in interstate commerce, and made criminal by section 10, and that the chief of the brotherhood and all members engaged in enforcing that rule were equally guilty with him as principals, and all guilty of conspiring to commit an offense against the United States subject to the penalties of section 5440, R. S. U. S. The court granted a mandatory injunction to compel the interchange of facilities. It was said however that the defendants could avoid obedience to the injunction by actually ceasing to be employees of the company, although if they left the service of the company under rule 12 of their order so as to compel the defendant company to injure the complainant company, they were doing an unlawful act and rendering themselves liable in damages for any injuries which are thereby inflicted,

and might be liable to a criminal penalty. The arm of a court of equity could not be extended by mandatory injunction to compel the performance of personal services. See 54 Fed. 746 (1893), where one of the engineers was adjudged guilty of contempt. See also *C., B. & Q. R. Co. v. B., C. R. & N. R. Co.*, 34 Fed. 481 (1888). See also *Arthur v. Oakes*, 11 C. C. A. 209, 63 Fed. 310 (1894).

In *Beers v. Wabash, St. Louis & Pacific Railroad Co.*, 34 Fed. 244 (1889), the court made the same holding as to rule 12 of the brotherhood, and as the railroad was operated by a receiver, the court said the receiver could not refuse to receive from and deliver to a connecting road, although by doing so his own road may be involved in a strike with its employes.

§ 337 (257). **The incidental interference with commerce by a peaceable strike not a violation of the section.**—While the employes of a railroad corporation cannot lawfully combine to compel their employer to discriminate against the traffic of a connecting railroad for any reason, the *incidental* interference with interstate traffic resulting from a combined cessation of employment by railroad employes for the purpose of bettering their own conditions of service does not constitute a criminal conspiracy or an offense under section ten of the Interstate Commerce Act. See *Arthur v. Oakes*, 11 C. C. A. 209, 63 Fed. 310 (1894). The point was directly ruled by Adams, J., in the case of the *Wabash Railroad Co. v. Hannahan et al.*, 121 Fed. 563 (1903), where the court dissolved a temporary injunction granted without notice against the officers of the brotherhoods of trainmen and firemen restraining them from ordering a strike on the Wabash Railroad. The court said that while the employes, the members of the brotherhoods, had the right to combine in leaving their employment, the court would retain jurisdiction of the case so that in the event of any molestation of or interference with interstate commerce by them after leaving employment, the lawful powers of the court could be invoked to restrain such interference.

See also *Hopkins v. United States*, 171 U. S. 578, 43 L. Ed. 290 (1898), Taft, J., in *Thomas v. Cincinnati, N. O. & T. O. Railroad*, 62 Fed. 803. This subject of what constitutes a

conspiracy in restraint of trade has been more extensively discussed in connection with the more comprehensive provisions of the so-called Anti-Trust Law of 1890, *infra*, § 432 *et seq.* See also charge to grand jury by Grosscup, J., as to what constituted a criminal conspiracy in interstate commerce, 62 Fed. 838 (1893); charge to grand jury in California by Ross, J., 62 Fed. 834 (1893); by Morrow, J., 62 Fed. 840. See *supra*, ch. VI.

§ 338 (258). Construction of the statute.—Under the statute before its amendment in 1903 it was held that a corporation could not be indicted thereunder, as the only parties punishable were individuals. *United States v. Michigan Central Railroad Co.*, 43 Fed. 26. (But see act of Feb. 19, 1903, *infra*, § 422.) The agent who was a party to the carrying of freight or passengers at a rate less than the published tariff was subject to indictment. Under that provision of the section making it unlawful for carriers to receive greater or less compensation from one shipper than from another for an equal service, an indictment stating that a carrier gave a rebate to one shipper without stating any instance in which he refused a like rebate to another shipper, is defective in not showing discrimination. *United States v. Hanley*, 71 Fed. 672 (1896). It was held in the same case that an indictment for paying or receiving rebates would not lie under the clause making it unlawful for the carrier by means of false billing, classification or any other device knowingly to assist or suffer any person to obtain transportation at less than the regular tariff rates.

An agent of a railroad who merely collects freight and has nothing to do with fixing the rates is not indictable under the act for collecting a greater rate for a shorter than for a longer haul. *United States v. Mellin*, D. of Kan., 53 Fed. 229 (1893). As to essentials of indictments under the act, see also *United States v. De Coursey*, 82 Fed. 302; *United States v. Henley*, 71 Fed. 672.

This offense of obtaining transportation of property at less than regular rates by means of false billing, etc., is not one that requires the transportation of the property to its destination to make it complete, but the offense is complete when the

contract for the illegal rate was secured, and could only be prosecuted in that district. *Davis v. United States*, 104 Fed. 136 (1900).

In *United States v. Howell*, 56 Fed. 21 (1894), West Dist. of Ark., it was held that shippers of lumber could be convicted of conspiracy to violate the Interstate Commerce Act upon showing that their servants procured unlawful discrimination in rates by false weights, provided they knew of the unlawful acts and permitted them to continue. *United States v. De Coursey*, 82 Fed. 302 (1897).

For an indictment for alleged violation of section 3, held defective for want of sufficient allegations of alleged undue preference in the furnishing of switching connections and car distribution, in 1906 before the amendment of that year, see *U. S. v. B. & O. R. R.*, 153 Fed. 997.

§ 339 (259). Removal of indicted persons to other districts for trial.—In *Davis v. United States*, 43 C. C. A. 448, 104 Fed. 136 (1900), the appellant was indicted in the northern district of Texas for trial under an indictment alleging violation of section ten, paragraph three, of the Act to Regulate Commerce. The United States district court at Cincinnati made an order directing the removal of the appellant for trial to the northern district of Texas. It was claimed that the offense was committed in Texas, although the shipment was made from Cincinnati to Texas, under the provision of section 781, R. S. U. S., providing that when any offense against the United States was begun in one judicial circuit and completed in another, it should be deemed to have been committed in either and may be dealt with, inquired of and tried or punished in either district, in the same manner as if it had been actually and wholly committed therein. The court held that this section was intended to provide for that class of cases where the crime was not completed in one district, but where a separate and essential act of commission constituting the crime is committed in another district, and that this section therefore had no application to the case of a shipper who obtains lower rates by means of false classification, billing, etc. The offense in that case is complete when the shipment is made. The court therefore

held that the district court erred in ordering a removal of the defendant to Texas, and he was ordered discharged.

As to removal of United States prisoners from one district to another under 1014, R. S., see *Green v. Henkel*, 183 U. S. 249, 46 L. Ed. 177 (1904); *Beaver v. Henkel*, 194 U. S. 73, 48 L. Ed. 882.

§ 340 (259a). Limitation of criminal prosecution under the act.—While there is no limitation of criminal prosecution fixed in the act, sec. 1044, R. S. U. S. provides limitation of three years, in case of all offenses “other than capital.” “Suits and prosecutions for penalties and forfeitures” are subject under sec. 1047, R. S. U. S. to limitation of five years.

SECTION 11.

§ 341. Interstate Commerce Commission—How appointed.

342. The organization and membership of the commission.

§ 341 (260). Interstate Commerce Commission—how appointed.—SEC. 11. That a commission is hereby created and established to be known as the Interstate Commerce Commission, which shall be composed of five Commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. The Commissioners first appointed under this Act shall continue in office for the term of two, three, four, five, and six years, respectively, from the first day of January, Anno Domini eighteen hundred and eight-seven, the term of each to be designated by the President; but their successors shall be ap-

[Terms of commissioners.]

pointed for terms of six years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired time of the Commissioner whom he shall succeed. Any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. Not more than three of the Commissioners shall be appointed from the same political party. No person in the employ of or holding any official relation to any common carrier subject to the provisions of this act, or owning stock or bonds thereof, or who is in any manner pecuniarily interested therein, shall enter upon the duties of or hold such office. Said Commissioners shall not engage in any other business, vocation, or employment. No vacancy in the Commission shall impair the right of the remaining Commissioners to exercise all the powers of the Commission. (*See section 24, enlarging Commission and increasing salaries.*)

§ 342. The organization and membership of the commission. The commission was organized in 1887 by the appointment by President Cleveland and confirmation by the senate of the following members:

Hon. Thomas M. Cooley, of Michigan,
Hon. William R. Morrison, of Illinois,
Hon. Walter L. Bragg, of Alabama,
Hon. Aldace F. Walker, of Vermont,
Hon. Augustus Schoonmaker, of New York.

Judge Cooley served as chairman until his retirement in 1891. He was succeeded by Mr. Morrison, who served as chairman until

December 31, 1897, when he was succeeded by Judge Martin A. Knapp, who had succeeded Mr. Schoonmaker, of New York, on the commission. Judge Knapp continued as chairman of the board until his appointment and confirmation as presiding justice of the new commerce court in December, 1910. Vacancies in the commission have been filled from time to time in accordance with the directions of the act that not more than two shall be members of the same political party. The commission is now (October, 1911), composed of the following members:

Hon. Judson C. Clemens, of Georgia, Chairman,
Hon. Charles A. Prouty, of Vermont,
Hon. Franklin K. Lane, of California,
Hon. Edgar E. Clark, of Iowa,
Hon. James F. Harlan, of Illinois,
Hon. B. H. Meyer, of Wisconsin,
Hon. C. C. McChord, of Kentucky.

SECTION 12.

- § 343. General investigating powers of commission.
- 344. Amendments of the section.
- 345. Compelling of self-incriminating testimony.
- 346. Corporations not included in immunity of witness.
- 347. Immunity acts of February 25, 1903 and June 13, 1906.
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- 349. Probative effect of self-incriminating testimony.
- 350. Immunity is limited to the subject of testimony.
- 351. Power of the court to enforce testimony before the commission sustained.
- 352. Relevancy of testimony before the commission.
- 353. Limitation of the power of the commission to enforce testimony.
- 354. Investigating powers of a grand jury in the United States courts.
- 355. General powers of the commission.

[Power and duty of Commission to inquire into business of carriers and keep itself informed in regard thereto.]

§ 343. General investigating powers of commission.—Sec. 12. (*As amended March 2, 1889, and February 10, 1891.*) That the Commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this Act, and shall keep itself informed as to the manner and method in which the same is conducted,

[Commissions required to execute and enforce provisions of this Act.]

and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created; and the Commission is hereby authorized and required to execute and enforce the provisions of this Act; and, upon the request of the Commission, it shall be the duty of any

[Duty of district attorney to prosecute under direction of Attorney-General.]

district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney-General of the United States all necessary proceedings for the enforcement of the provisions of this Act and for the punishment of all violations thereof, and the

[Costs and expenses of prosecution to be paid out of appropriation for courts.]

costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; and for the purposes of this Act the Commission shall have

[Power of Commission to require attendance and testimony of witnesses and production of documentary evidence.]

power to require, by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, com-

tracts, agreements, and documents relating to any matter under investigation.

[Commission may invoke aid of courts to compel witnesses to attend and testify.]

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the Commission, or any party to a proceeding before the Commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section.

[Penalty for disobedience to order of the court.]

And any of the circuit courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any common carrier subject to the provisions of this Act, or other person, issue an order requiring such common carrier or other person to appear before said Commission (and produce books and papers if so ordered) and give evidence touching the matter in ques-

[Claim that testimony or evidence will tend to criminate will not excuse witness.]

tion; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying; but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

[Testimony may be taken by deposition.]

The testimony of any witness may be taken, at the instance of a party in any proceeding or investigation pending before the Commission, by deposition, at any time after a cause or proceed-

[Commission may order testimony to be taken by deposition.]

ing is at issue on petition and answer. The Commission may also order testimony to be taken by deposition in any proceeding or investigation pending before it, at any stage of such proceeding or investigation. Such depositions may be taken before any judge of any court of the United States, or any commissioner of a circuit, or any clerk of a district or circuit court, or any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court, or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, nor

[Reasonable notice must be given.]

interested in the event of the proceeding or investigation. Reasonable notice must first be given in writing by the party, or his attorney, proposing to take such deposition to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place

of the taking of his deposition. Any person may be compelled

[Testimony by deposition may be compelled in the same manner as above specified.]

to appear and depose, and to produce documentary evidence, in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the Commission as hereinbefore provided.

[Manner of taking depositions.]

Every person deposing as herein provided shall be cautioned and sworn (or affirm, if he so request) to testify the whole truth, and shall be carefully examined. His testimony shall be reduced to writing by the magistrate taking the deposition, or under his direction, and shall, after it has been reduced to writing, be subscribed by the deponent.

[When witness is in a foreign country.]

If a witness whose testimony may be desired to be taken by deposition be in a foreign country, the deposition may be taken before an officer or person designated by the Commission, or

[Depositions must be filed with the Commission.]

agreed upon by the parties by stipulation in writing to be filed with the Commission. All depositions must be promptly filed with the Commission.

[Fees of witnesses and magistrates.]

Witnesses whose depositions are taken pursuant to this Act, and the magistrate or other officer taking the same, shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

§ 344. Amendments of the section.—Section 12 was not changed in the amendatory acts of 1906 and 1910, but it was amended by the act of March 2, 1889, and again on February 10, 1891, in respect to the duties of the district attorney and the provisions for the summoning of witnesses. It has also been materially amended and enforced by the acts of 1893, 1903, and 1906 concerning self incriminating testimony.

§ 345 (263). The compelling of self-incriminating testimony.—The most important judicial discussion under this section has been in relation to the power of enforcing self-incriminating testimony. The provision of the third paragraph of the section, that a party could be compelled to give self-incriminating testimony, but providing that the evidence given by him should not be used against him, was held in *Counselman v. Hitchcock*, 142 U. S. 547, 35 L. Ed. 1110 (reversing 44 Fed. Rep. 271), to be unconstitutional as violative of the fifth amendment to the

constitution, which declares that no person shall be compelled in any criminal case to be a witness against himself. The court disapproved the decision of the New York court of appeals in *People v. Kelley*, 24 N. Y. 74, which held the immunity in a similar statute sufficient, and ruled that the statutory enactment to be valid must afford absolute immunity against further prosecutions. The petitioner who had declined to answer, whether he had received a rebate or not, on the ground that it would incriminate him, was discharged on habeas corpus. After this decision, the statute was amended by the passage of the act of February 11, 1893, as follows:

That no person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements and documents before the Interstate Commerce Commission, or in obedience to the subpoena of the Commission, whether such subpoena be signed or issued by one or more Commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of the act of Congress, entitled "An act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, or of any amendment thereof on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. *But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify*, or produce evidence, documentary or otherwise, before said Commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding: *Provided*, That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce books, papers, tariffs, contracts, agreements and documents if in his power to do so, in obedience to the subpoena or lawful requirement of the Commission shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by fine not less than one hundred dollars nor more than five thousand dollars, or by imprisonment for not more than one year or by both such fine and imprisonment.

The act of 1893 was sustained in *Brown v. Walker*, 161 U. S. 591, 40 L. Ed. 819 (1896), the supreme court holding that it afforded absolute immunity against prosecutions, federal or state, for the offense to which the question related, and there-

fore deprived the witness of his constitutional right to decline to answer. (Justices Shiras, Gray, White and Field dissenting on the ground that the state courts would not be compelled to accept the saving clause of the federal statute in respect to crimes against the state.) This amendment of 1893 only refers to testimony before the Interstate Commerce Commission, and does not refer to testimony given before a court in a suit brought under the provisions of sections 8 and 9 of the act. The decision in the Counselman Case would clearly apply to the provision of section 9, providing that self-incriminating testimony forced from a witness should not be used against him.

The Amendatory Act of February 19, 1903, known as the Elkins Act, in section 3 specifically provides:

“In proceedings under the act the courts shall have the power to compel the attendance of witnesses both upon the part of the carrier and shipper who should be required to answer on all subjects relating directly or indirectly to the matter in controversy, and to compel the production of all books and papers both of the carrier and shipper which relate directly and indirectly to such action. The claim that such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such person from testifying or such corporation from producing its books or papers; but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in such proceeding.”

The same provision of immunity is, therefor, extended to all witnesses, whether before a commission or court, who are compelled to give self incriminating testimony under the act.

§ 316 (264). Corporations not included in immunity of witness.—In a prosecution under section 10, before the amendments of 1903, it was held that corporations could not be indicted, as the only parties punishable thereunder were individuals; an official could not therefore excuse himself from testifying on the ground that his testimony would implicate the corporation, his employer. In *re Peasley*, 44 Fed. 271 (1890). In a prosecution under section 5 of the act, whereunder pooling between carriers is made unlawful, and each day of its continuance made a separate offense, indictments

against carrier corporations were returned by the grand jury in western district of Tennessee under charge of Hammond, J. 115 Fed. 588 (1902). In this charge the opinion was expressed not only that corporations were indictable under section 5, but that under the act of 1893 there was no vicarious immunity and that there was no immunity to the corporation from the enforced testimony of the officers, or productions of its books and papers.

The Elkins Act of February 19, 1903 (*infra*, § 422), has distinctly changed the relations of corporations to the act, *first*, in making (sec. 1) the corporation liable for conviction for misdemeanor and fine on account of any act done or omitted in violation of the statute by any officer acting in its behalf, and, *second*, in expressly authorizing (sec. 3) the enforced production of the corporate books and papers; and it then grants immunity in the language above quoted.

It was held by the supreme court in *Hale v. Henkel*, 201 U. S. 43, 50 L. Ed. 652 (1906), in a case of habeas corpus sued out by a witness who was summoned under a *subpoena duces tecum* to bring certain papers and agreements of the American Tobacco Company, his employer, in an examination before the grand jury for an alleged violation of the anti-trust act and he declined to obey on the ground of self incrimination, that the immunity given by the act of February 25, 1903 (see *infra*, § 488), was sufficient for the protection of the witness.

It was also held that he could not claim the privilege of another person or the corporation of which he was an officer or employe. While the corporation could not claim immunity under the fifth amendment it was entitled to protection against unreasonable searches and seizures under the fourth amendment. The corporation was a creature of the state. Although the corporation in this case was a state corporation, the power of the general government to the exercise of this authority was the same as if the corporation had been created by act of congress, although the court claimed no general visitatorial power over the state corporations. Justices Brewer and Fuller dissented, holding that corporations were protected in both the 4th and 5th amendments. See also *McAlister v. Henkel*, 201 U. S. p. 90, 50 L. Ed. 671 (1906), where the papers called for were specifically described, and the judgment was affirmed.

The same ruling was made in *Nelson v. U. S.*, 201 U. S. 92, 51 L. Ed. 673 (1906), in a case arising under the anti-trust act in a suit of the government against the General Paper Company. The refusal of the corporate officers to obey the order of appellate court in such a case to produce documentary evidence could not be justified on the theory that the evidence was not in their possession or under their control, when their possession was not personal but that of a corporation. It was also ruled that evidence, whether documentary or oral, sought to be elicited from witnesses in such an action, was material where it would tend to establish the manner in which the agent executed its functions, and that the immateriality of the evidence would not justify their refusal to answer questions put to them and to produce written evidence in examination before a special master; and the materiality of the evidence was not open to consideration on a writ of error sued out by witnesses to review a judgment for contempt.

These cases were both under the Anti-Trust Act, but the principle decided that the immunity is personal to the witness and did not extend to the corporation of which he was an employe, was clearly applicable to proceedings before the commission or the courts under the Interstate Commerce Act. There is, therefore, no immunity to the corporation by reason of the enforced testimony of its officers, nor can an officer or an employe refuse to produce books of an employer corporation on the ground that it would implicate the corporation employer. *Gardner v. Early*, 69 Iowa, 42. The ruling in *Hale v. Henkel* was re-affirmed in *Wilson v. United States*, *infra*, in 1911.

In proceedings under the Interstate Commerce Act therefore the immunity as regards books and papers extends in any event only to those which are private, that is, to those whose production or inspection can only be enforced when incriminating under statutory immunity. It does not include records, whether corporate or individual, which are made public by law.

Thus the railroad rates and regulations concerning rates are required by law to be public. A tariff sheet of a railroad which is required by law to be publicly posted is not a private paper, and its enforced production in a prosecution against a railroad company is not compelling it in a legal sense to give evidence against itself. *L. & N. R. Co. v. Commonwealth* (Ky. 1899),

51 S. W. Rep. 167; as to applications of same principle, see *People v. Coombs*, 158 N. Y. 532 (1899); *State v. Donovan*, 10 N. Dak. 203; *State v. Smith*, 74 Iowa, 580.

§ 347. Immunity act of Feb. 25, 1903 and June 13, 1906.—By the act of February 25, 1903 it was provided both as to the Interstate Commerce Act and the Anti-Trust Act that no person shall be subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, in any suit proceeding or prosecution under said act, and provided further that no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying.

In *U. S. v. Armour*, 142 Fed. 808, in March, 1906, district court northern district of Illinois, it was held on a motion to quash indictments of corporations and individuals for conspiracy in violation of the Anti-Trust Act that a corporation, whether state or federal, could not claim immunity from prosecution for violation of the Interstate Commerce or Anti-Trust laws of the United States because of testimony given or produced by its officers or agents before the Interstate Commerce Commission or the Commissioner of Corporations or in any proceeding, suit, or prosecution under such laws, the right to immunity being limited to individuals who, as witnesses, gave testimony or produced evidence; but as to the individual defendants it was held that the immunity under the acts of congress extended to a person who gave self-incriminating statements to the Commissioner of Corporations in the course of his official investigation under section 6 of the act of February 14, 1903, creating the department to commerce and labor and authorizing the Commissioner of Corporations to make investigations and compel the attendance of witnesses. The indictment as to individual defendants was therefore quashed. Under the recommendation of the president, in view of this ruling, the act of June 13, 1906 was passed providing that “under the several immunity acts immunity shall extend only to a natural person who, in obedience to a subpoena, gives testimony under oath or produces evidence, documentary or otherwise, under oath.”

In a subsequent indictment of the parties whose indictment was quashed in *U. S. v. Armour*, *supra*, it was held in *U. S. v.*

Swift, 186 Fed. 1002 (1911), that this immunity act did not make the defendants immune from prosecution thereafter for continuing the same offense. See *infra*, Anti-Trust Act, sec. 2.

§ 348. Corporate official compelled to produce corporate books containing personally incriminating matter.—In *Wilson v. The United States*, 220 U. S. 614, 55 L. Ed. — (May, 1911), the supreme court affirmed the judgment of the circuit court for the southern district of New York in committing the president of the United Wireless Telegraph Company, the main corporation, for contempt for refusing to produce the corporate books in his custody before the grand jury. The court said that Wilson was protected against giving oral self-incriminating testimony and against the production of his private books and papers; but the copies of letters written by the president of the corporation in the course of his transactions were as much a part of its documentary property, subject to its control and to its duty to produce when lawfully required in judicial proceedings, as its ledgers and minute books. He could not make the books his private or personal books by keeping copies of personal letters in them. It seems that the court had suggested the removal of the strictly private letters from the books. The court said the fact that the appellant himself wrote or signed the official letters copied into the books neither conditioned nor enlarged his privilege, and that the principle applied not only to public documents and public offices, but also to records required by law to be kept in order that they may be suitable information for transactions which are appropriate subjects of governmental regulation and the enforcement of restrictions validly established; there the privilege which existed as to private papers cannot be maintained.

Wilson held the corporate books subject to the corporate duty. If the corporation was guilty of misconduct, he could not withhold its books to save it; and if he were implicated in the violations of law, he could not withhold the books to protect himself from the effect of their disclosures. It was immaterial that the corporation was organized under state law, and that Wilson's own conduct was under investigation with a view to his own indictment. Justice McKenna dissented.

§ 349 (265). **Probative effect of enforced self-incriminating testimony.**—It was held in *Burrell v. Montana*, 194 U. S. 572 (1904), 48 L. Ed. 1122, that testimony given in an examination in bankruptcy, which was used without objection on the trial of the bankrupt on indictment in the state court did not violate any federal right. Section 7 of the Bankrupt Act providing that the testimony should not be offered, did not deprive the evidence of probative force when admitted without objection in the state court.

§ 350 (266). **Immunity is limited to the subject of testimony.** In *United States v. Price*, 96 Fed. 960 (1899), parties were indicted for conspiring to obstruct justice by taking from a witness subpoenaed to appear before a United States grand jury, certain papers which he had been directed to produce as furnishing testimony concerning a charge of violation of the act to regulate commerce then before the grand jury. Two of the indicted persons testified that they had been called before and had testified before the grand jury concerning the violation of the act to regulate commerce, and had also testified concerning the taking of the papers from the witness. The court overruled the pleas, saying it was not the intention of congress to grant to a witness amnesty as to other crimes merely because he had testified to the violation of the Interstate Commerce Act. The amnesty was only co-extensive with the requirement to testify. The first clause of the act of 1893 made necessary the second clause; otherwise neither would have been effective. The latter supplemented the former and was limited by it, and referred to nothing except to matters that witnesses should not be excused from testimony by virtue of the act. The court said that this was not the proper construction of the act of 1893. The least collusion with a friendly grand jury might enable the worst violator of the laws of the United States to entitle himself to testify by procuring himself to be summoned as a witness nominally to testify, or to be asked about a violation of the Interstate Commerce Law.

§ 351 (267). **Power of the court to enforce testimony before the commission sustained.**—In *Brimson v. Interstate Commerce Comm.*, 154 U. S. 447, 38 L. Ed. 1047 (1893), the supreme court,

reversing 53 Fed. 476, sustained the authority of the circuit court under this section of the Interstate Commerce Act to enforce the giving of testimony and the production of books and papers. It was strongly urged that the provision was in conflict with the constitution in that it imposed on judicial tribunals duties that were not judicial in their character. But the court ruled that the proceeding under the twelfth section of the act was not merely ancillary and advisory, nor was its object merely to obtain an opinion of the circuit court, which would be without operation upon the rights of the parties. Any judgment would be a final and indisputable basis of action as between the commission and the defendant, and furnish a precedent for similar cases. The judgment was none the less one of a judicial tribunal, dealing with questions judicial in their nature, and presented in the customary forms of judicial proceedings, because its effect may be to aid an administrative or executive body in the performance of duties legally imposed upon it by congress in the case of a power granted by the constitution. The issue made in such a case was not one for the determination of a jury, nor could any question of contempt arise until the issue of law in the circuit court was determined adversely to the defendants and he had refused to obey, not the order of the commission, but the final order of the court. Such a power to adjudge for contempt could not, under our system of government and consistently with due process of law be vested in a subordinate and administrative or executive tribunal for final determination. There was a dissenting opinion by Justice Brewer, in which Chief Justice Fuller and Justice Jackson concurred. 155 U. S. 1, 39 L. Ed. 49.

§ 352 (268). Relevancy of testimony before the commission. In a later decision, *Interstate Commerce Commission v. Baird*, 194 U. S. 25 (1904) 48 L. Ed. 860 the supreme court sustained an application of the commission, reversing the circuit court, for the production of papers and the giving of testimony in an investigation pending before the commission concerning an alleged pooling agreement in the transportation of coal. The complaint filed before the commission alleged that the railroad companies were natural competitors and had made an agreement or combination in coal rates which were unreasonable and

unjust. The witness refused to produce contracts for purchasing coal by the railroads from operators in Pennsylvania and to answer certain questions as to the sale and price of coal, and it was claimed that the enforced production of these papers and the compelling of this testimony would be violative of the fourth and fifth amendments to the constitution. The supreme court said that while the contracts might not establish the pooling arrangement, they would have a legitimate bearing upon the inquiry, and that the testimony should not be so limited as to unreasonably hamper the commission by narrowing its field of inquiry beyond the reasonable requirements of the rights of citizens, as such a course would seriously impair its usefulness and prevent a realization of the salutary purposes of congress. The court held also that as under the act of 1903 the witnesses were given immunity, there was no invalid objections under the fourth and fifth amendments to the constitution. It was also ruled in this case that the contracts, under which the railroad companies engaged in interstate carriage of anthracite coal had acquired certain collieries, whose proprietors were about to build competing lines and guaranteed the stock and bonds issued in payment thereof by a corporation whose charter they had purchased for that purpose, could properly be produced, although they had been made with third persons not parties of the proceeding.

§ 353. Limitation of the power of the commission to enforce testimony.—In *Harriman v. Interstate Commerce Commission*, 211 U. S. p. 407, 53 L. Ed. 253, December, 1908, the court reversed the circuit court of the United States, southern district of New York, in one case where the court directed appellant to answer certain questions in an investigation by the Interstate Commerce Commission, and affirmed its judgment in another case where it refused to compel an answer. See 157 Fed. 432. This was an investigation by the commission on its own order (see 12 I. C. C. R. 277), as to certain consolidations and combinations in interstate commerce. Appellant Harriman was interrogated about the ownership of certain stock of the Chicago & Alton Railway Company, deposited with his bankers, and certain stock of other railroads so purchased and deposited. He was asked whether he or any other director bought stocks of

the Union & Southern Pacific in anticipation of dividends; and appellant Kahn, member of the firm of Kuhn, Loeb & Co., was asked concerning the same matters. The court held that the witnesses could not be required to answer before the Interstate Commerce Commission except in connection with complaints for violation of the Interstate Commerce Act or with the investigation by the commission of subjects that might have been made the object of complaint, these being the only matters contemplated by the provision of section 12 of that act which gave the commission power to require testimony for the purposes of the act, which power could not be exercised by the commission performing its duty under that section to keep itself informed as to the manner and method in which the business of common carriers was conducted, nor in connection with the enforcement of the requirement of section 20 concerning reports by carriers nor to aid the commission in recommending, pursuant to section 21, additional legislation by congress. Justices Day, Harlan, and McKenna dissented. The court said the act clearly showed that the power to compel the attendance of witnesses was to be exercised only in connection with the quasi-judicial duties of the commission. This decision was rendered after the amendments of 1906, but prior to the amendment of 1910. See section 15, *infra*.

§ 354. Investigating power of a grand jury in United States courts.—It was also ruled in the Wilson Case, *supra*, that a grand jury could make investigation, summon and examine witnesses, and compel the production of books and papers, although there was no case or specific charge pending before it, and that a *subpoena duces tecum* is not invalid because it contains no *ad testificandum* clause but simply directs a corporation which could not give oral testimony, to produce books.

It is not necessary that a *subpoena duces tecum* directed to a corporation should conform to the provisions of the U. S. R. S. 877, concerning the summoning of witnesses; nor is an accused accorded the right to be apprised of the names of witnesses who appeared before the grand jury.

§ 355. General powers of the commission.—The powers of the commission have been so enlarged by the amendments of

1906 and 1910 which are set forth in succeeding sections that the general provisions of this section, giving the commission authority to inquire into the management of the business of common carriers to obtain full and complete information, and to execute and enforce the provisions of the act, have been superseded by the comprehensive range of powers set forth in sections 15, 16, and 20, as enacted in the amendments referred to.

The comprehensive and inquisitorial power of the commission is illustrated by investigations from time to time as to freight rates in different sections of the country and in other inquiries made, either on its own motion or under specific direction of congress. Very large administrative duties are also required in connection with the Safety Appliance Laws. See *infra*. See report on the eastern bituminous coal situation, January 25, 1907, and the report on block signal systems, February 23, 1907.

The services of the commission have also been invoked in adjusting controversies between shippers and carriers, as in the investigation of the differentials recognized by the carriers in their rates to the different cities of the eastern seaboard. See report for 1904, p. 23.

The commission in taking testimony before itself, whether in original investigations or in the hearing of complaints, is empowered to summon witnesses or to produce documentary evidence from any place in the United States to any designated place of hearing. The power of the commission in this respect is greater than the power of the courts of the United States, as witnesses living out of the district are not required to attend court at a greater distance than a hundred miles, nor to attend the taking of depositions under a commission at any place out of the county, nor more than forty miles from the place of their residence. Section 870 R. S. U. S. This power however has been rarely used, as the commission has arranged its hearings as authorized by the act (section 19) in different parts of the county convenient for the witnesses.

SECTION 13.

§ 356. Complaints to commission—How and by whom made—How served upon carriers.

357. The amendment of 1910.

358. Procedure before commission—Parties.

259. Pleadings and proofs.

360. Demand for reparation must be specifically stated.

361. Burden of proof.

362. Production of books and papers.

363. The rulings of the commission as precedents.

§ 356 (270). Complaints to commission—How and by whom made—How served upon carriers.—SEC. 13. (*As amended June 18, 1910.*) That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this Act, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within

[Reparation by carriers before investigation.]

the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of

[Investigations of complaints by the Commission.]

law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

Said Commission shall, in like manner and with the same authority and powers, investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory at the request of such commissioner or commission, and the Interstate Commerce Commission shall have full author-

[Commission may issue orders in investigations begun on its own motion.]

ity and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning

which a complaint is authorized to be made, to or before said Commission by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act. And the said Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this Act, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had excepting orders for the payment of money. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

§ 357. The amendment of 1910.—This section was not amended until the act of June 18th, 1910. In its original form it provided for complaints by shippers, or their representatives, but made no provision for a complaint by a common carrier, and while authorizing an inquiry by the commission on its own motion, made no specific provision for the powers which the commission could exercise in such investigation made upon its own motion. Thus in the *Harriman Case*, *supra*, decided after the amendment of 1906, it was held that in such investigation the commission had no power of compelling testimony. The commission (see page 8 of report of 1909) had said that it was a question whether it could make an order under the fifteenth section in a proceeding instituted on its own motion under section 13.

The amendatory act of 1910 amends this section, providing for the making of a complaint by a common carrier, and also that the “commission shall have the same powers and authority to proceed in any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this act, including the power to make and enforce any order or orders, in the case, or relating to the matter or thing concerning which the inquiry is had, excepting the orders for the payment of money.”

In this connection also should be read section 9 of the act.

§ 358 (271). Procedure before commission—Parties.—This section regulating procedure before the commission has been liberally construed by the commission in furtherance of the

obvious purpose of securing a summary investigation and with only so much formality as was essential to justice. Dilatory proceedings are considered objectionable and a single speedy hearing is desired in every case. 1 I. C. C. R. 223, 1 Int. Com. Rep. 410.

Any person or association is entitled to complain either for himself or for any community in which he is interested. Many complaints have been made before the commission by local trade organizations interested in the locality or in specific industries. Thus the Boston Fruit & Produce Exchange was held a mercantile society within the meaning of the section and could maintain a proceeding without showing special damage to itself as a society. 4 I. C. C. R. 664, 3 Int. Com. Rep. 493. The Chicago Live Stock Exchange, whose members were engaged in the sale of live stock on commission in Chicago, was held entitled to maintain a proceeding to correct an unreasonable freight rate upon live stock from various points to Chicago, notwithstanding certain by-laws and proceedings of the association were claimed to be in violation of the Anti-Trust law. 7 I. C. C. R. 513. It is immaterial that such trade organizations are unincorporated. See also 10 I. C. C. R. 428.

The Forest City Freight Bureau, which admitted members upon written contract to perform certain services in return for an annual fee, is an association competent to bring a complaint before the commission. The fact that it must be able to answer in costs in case such should be awarded against it on appeal taken into the courts does not take away the right to bring a complaint under the act; 13 I. C. C. Rep. 109. It was therefore an "association" within the meaning of section 13 of the act.

The prior leave of court is not necessary to entitle a shipper to proceed against a railroad in the hands of a receiver. 6 I. C. C. R. 520. When one makes a complaint under the act to regulate commerce and sets up a personal grievance which he fails to prove before the commission, if a violation of law by the defendant appears, the commission can take the necessary steps to bring the violation of the law to an end. 1 I. C. C. R. 208, 1 Int. Com. Rep. 611.

As to parties defendant, it was held by the supreme court in *Texas Pacific R. Co. v. Interstate Commerce Commission*, *supra*,

that the owner of the portion of line over which through freight is carried is a proper but not a necessary party in a proceeding concerning the alleged discrimination between inland and import rates. The commission however has exercised the right to bring in all parties interested in a case. 4 I. C. C. R. 276, 3 Int. Com. Rep. 282, 5 I. C. C. R. 571, 4 Int. Com. Rep. 230.

The disposition of the commission to simplify its practice and procedure was illustrated in its ruling, 20 I. C. C. R. 486, in a case involving a demand for a switch track connection, which under the ruling of the supreme court under the statute then existing in force, could only be made by a shipper. See *Interstate Commerce Commission v. D. L. & N. R. Co.*, *supra*. The complainant, an Electric Traction Company, in order to obviate this objection produced at the hearing two letters from shippers authorizing the application. The commission ruled that for all practical purposes this was sufficient to make them parties to the proceeding. See also 12 I. C. C. R. 483.

§ 359 (272). Pleadings and proofs.—A complaint concerning classification of rates should not be made against the classification committee or rate committee, but against the carriers who were represented by such committees, and the complaint should point them out by name. 4 I. C. C. R. 276, 3 Int. Com. Rep. 282. The commission has early announced and it has always insisted that it would not express opinions on abstract questions, nor on questions presented on *ex parte* statements of facts, nor on questions of the statute presented for its advice, but without any controversy pending before it on complaint of violation of law. 1 I. C. C. R. 8, 1 Int. Com. Rep. 18. The commission will not consider the claim of a party for injury to goods resulting from delay, detention, etc., or from any cause not attributable to any violation of the provision of the act to regulate commerce. 6 I. C. C. R. 85. Where reparation is asked to the extent of alleged excessive charges, reasonable time is allowed for making proof of the amounts paid when the evidence adduced shows excessive charges without disclosing the amount of the excess. 6 I. C. C. R. 335. The procedure is in the simplest form consistent with reasonable certainty. No replication is required. When the facts are not agreed upon, deposition may be taken upon notice or the hearing entered upon immediately after answer. Assign-

ments of hearing are made upon the request of either party and parties are heard orally or on briefs, as they may prefer. See 1 I. C. C. R. 223, 1 Int. Com. Rep. 408.

When a carrier fails to answer the complaint filed, the commission takes such proof of the facts as may be deemed proper and reasonable, and makes order therein accordingly. 5 I. C. C. R. 663, 4 Int. Com. Rep. 318.

§ 360. Demand for reparation must be specifically stated.—In order to avoid multiplicity of actions and consequent unnecessary labor and expense, and in order that defendants as well as the commission might have due notice of the full extent of a complaint, the commission has announced that reparation will not ordinarily be awarded in a formal case attacking a rate as unreasonable or otherwise in violation of law, unless intent to claim reparation is specifically disclosed therein, or in an amendment thereof filed before the submission of the case. See 20 I. C. C. R. 612. The commission said in this case that it was not a court and added, "its proceedings partake somewhat of a judicial or semi-judicial character, but its work is distinctively administrative" and said further that it was obviously fair that a complainant be required to disclose his whole case, and the demands upon the time of the commission was so many and pressing that unnecessary multiplicity of proceedings could not be encouraged or even tolerated.

§ 361 (273). Burden of proof.—The question of burden of proof has been construed in the matter of reasonableness of rates, section 1, discriminations, section 2, and unjust preferences, section 3. In general terms it may be said that the commission adopts the rules in regard to the burden of proof and the shifting of the weight of testimony in accordance with the established rules of courts of justice liberally and not technically administered. Thus the burden is upon the party making the complaint, 8 I. C. C. R. 561, and relief will not be granted without proof. 1 I. C. C. R. 185, 1 Int. Com. Rep. 627. But when the fact of a greater aggregate charge for a short or long haul on the same line is established, the burden is upon the carrier to justify such excess. 4 I. C. C. R. 104, 4 Int. Com. Rep. 348. But where the carrier makes application for relief under the fourth section,

he assumes the burden in the first instance. So where there is a departure from equal rates on several branches of a road, the carrier is called upon to justify. 2 I. C. C. R. 604, 2 Int. Com. Rep. 431. 8 I. C. C. R. 93, ruled that the burden is upon the carrier in all cases, where the departure from the rule of the law is made, to show clearly that his departure is justified, citing *Missouri Pacific Ry. Co. v. Texas & Pacific Ry. Co.*, 31 Fed. Rep. 862. When the facts justifying an apparent disparity in rates are peculiarly within the knowledge of the carrier (6 I. C. C. R. 1), the burden is on him; thus the carrier must justify the disparity between rates on grain and grain products. 3 I. C. C. R. 252, 2 Int. Com. Rep. 604.

As to the burden of proof on carriers as to the reasonableness of increase of rates, where such increase is made after January 1st, 1910. See section 15, *infra*.

The informal character of the procedure before the commission is illustrated by the case (9 I. C. C. R. 602) where the general freight agent of the Texas & Pacific Railroad Company referred to the commission a claim of a shipper for carload rating on a mixed carload of lemons and pineapples, it appearing that the tariff provided for a mixed carload of lemons and bananas and pineapples and bananas, but not for a mixed carload of lemons and pineapples, the general freight agent expressing his belief that the claim was equitable. The commission said that a matter submitted in this way should be treated as a complaint and answer; the railroad company should make answer and make reparation to the complainant for the rate above the carload rate.

When an important question is raised by the pleadings in a case, the determination of which will affect others quite as much as the parties before the commission, but the parties give their attention almost exclusively to other questions, and neither by the evidence nor in argument supply the commission with the information to enable it to be understandingly determined, the commission will decline to decide it, and leave the parties to bring it forward again as they may be advised. 1 I. C. C. R. 503, 1 Int. Com. Rep. 722.

§ 362 (274). Production of books and papers.—In 3 I. C. C. R. 186, 2 Int. Com. Rep. 584, the commission suggested the modes of procedure by which the inconvenience to defendant carriers of

producing books where many entries were involved, might be avoided by petitioner, as by requiring statements of specific charges and facilities during specified period, or taking depositions by consent in advance of hearing.

As to proceedings for taking testimony and the production of books and papers, see this case, in which the commission said that there was a very manifest difference between ordering the production of books and papers of carriers directly interested and those of other parties, strangers to the proceeding. It was said in this case that the books of defendant carrier as to the rates charged, the facilities furnished and the general movements of freight were in the nature of semi-public records, and statements should be made therefrom on request as promptly as practicable. (See this case for what is required for an order for the production of books and papers.)

As to the general powers of the commission in compelling the production of books and papers, see section 12, *supra*.

§ 363 (275). The rulings of the commission as precedents.—The rulings of the commission are based so distinctively upon the special facts of the cases submitted that the doctrine of judicial precedent has only a limited application. Thus in deciding a case against one or more carriers charged with making rates which are unjustly discriminating in a certain line of traffic, the decision may not apply at all to the rates in other sections where facts may be altogether different. 2 I. C. C. R. 365, 2 Int. Com. Rep. 245. One case can seldom be an exact precedent for another, for each traffic situation presents points of difference, and each complaint must be judged upon its own peculiar facts. 8 I. C. C. R. 409.

A rate may be unreasonable at one time, and through changed conditions may become reasonable at another time, even before the conclusion of the litigation as to the reasonability of the rate. See conclusion of opinion in Nebraska Rate case, 169 U. S. 1. c. p. 550, 42 L. Ed. 819 (1898).

The essentially shifting character of the conditions under which orders of the commission are made, that is, administrative orders regulating the conduct of the business of the carrier, and not involving payments for reparation, is recognized in the provision of the following section that such orders continue in force for a period not exceeding two years.

SECTION 14.

§ 364. Commission's report of investigation.

365. Amendment of the section.

366. The changed relation of the commission to the courts.

367. Procedure before the commission.

368. Reports of decisions.

§ 364 (276). Commission's report of investigation.—Sec. 14. (*Amended March 2, 1889, and June 29, 1906.*) That whenever an investigation shall be made by said commission, it shall be its duty to make a report in writing in respect thereto, which shall

[Commission must make report of investigations, stating its conclusions and order.]

state the conclusions of the Commission, together with its decision, order or requirement in the premises; and in case damages

[Reparation.]

are awarded such report shall include the findings of fact on which the award is made.

All reports of investigations made by the commission shall be entered of record, and a copy thereof shall be furnished to the

[Reports of investigations must be entered of record. Service of copies on parties.]

party who may have complained, and to any common carrier that may have been complained of.

The Commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted

[Reports and decisions. Authorized publication competent evidence.]

for public information and use, and such authorized publications shall be competent evidence of the reports and decisions of the commission therein contained in all courts of the United States and of the several states without any further proof or authentication thereof.

[Publication and distribution of annual reports of Commission.]

The commission may also cause to be printed for early distribution its annual reports.

§ 365. The amendments of the section.—Under this section, before the amendment of 1906, the commission was required to "report its findings of fact upon which its conclusions were based," and these "findings of fact" were made prima facie evidence thereafter as to all judicial proceedings as to every fact found. Under the section as amended in 1906, the findings of fact are required to be reported only in case of an award of money damages; and these are the only cases in which such find-

ings are made prima facie proof for any judicial proceedings, see *infra*, section 16. In other cases, the commission's report is only required to state its conclusion with its order.

§ 366. The changed relation of the commission to the courts. Under the act before the amendments of 1906, it was said by Justice Jackson in the Kentucky and Indiana Bridge Case, 37 Fed. 567 (1889), the first important decision under the act, that the commission could be regarded as the general referee upon each and every circuit court of the United States upon which the jurisdiction was conferred of enforcing the rights, duties and obligations recognized and enforced by the act. This was a case under the original act, and orders of the commission were not enforceable without the approval and assistance of the courts. In several cases the supreme court commented upon the fact that the act attributed prima facie effect to the findings of fact made by the commission. See *East Tennessee, etc., Ry. Co. v. Interstate Com. Com.*, 181 U. S. 1, 45 L. Ed. 719 (1901); and *L. & N. R. Co. v. Behlmer*, 175 U. S. 648, 44 L. Ed. 309 (1901).

Under the act as amended, it is only in the case of an award of money damages that the findings of the commission are made prima facie evidence in judicial proceedings, and those are the only cases which require a proceeding and judgment in court. The supreme court, however, has ruled with respect of the administrative orders of the commission, that the findings of fact made by the commission and concurred in by a federal circuit court, would not be disturbed unless the record established that a clear and unmistakable error had been committed. See *Illinois Central R. Co. v. Interstate Commerce Commission*, 206 U. S. 441, 51 L. Ed. 1128, May 1907, enforcing an order of the commission. See also 10 I. C. C. Rep. 505; and the *Baltimore & Ohio Coal Case*, *supra*.

§ 367. The procedure before the commission.—In order to determine a claim of reparation for the charge of an unreasonable rate, the commission must decide what rate should have been charged, that is, what is a reasonable rate, in order to determine the amount of damage to which the party is entitled. As to the procedure of the commission in claims of reparation, it was ruled that the complainant must make proof of his damage (8 I. C. C.

R. 158) ; that all the carriers on the route need not be before the commission (6 I. C. C. R. 378), and that speculative damages will not be allowed. 5 I. C. C. R. 97, 3 Int. Com. Rep. 740. Nor will the commission consider claims not arising out of the duties imposed by the Act. 4 I. C. C. R. 265, 3 Int. Com. Rep. 278. It is sufficient for the complainant to consult the published schedule of charges, and he is entitled to recover thereon the excess over such schedules charged him. 7 I. C. C. R. 255. See also as to conclusions of commission as to its jurisdictions in matter of awarding reparation. 5 I. C. C. R. 84, 3 Int. Com. Rep. 711.

The subjects of reparation was discussed by the commission in the case of the Independent Refiners Association, 6 I. C. C. R. 378, 7 I. C. C. R. 513. In this case claims of reparation were allowed to be filed in the same proceeding by the individual shippers who were members of the complaining association. The circuit court however for the western district of Pennsylvania, 82 Fed. 192 (1897), refused to enforce this order, holding that each complainant had a plain, adequate and complete remedy at law. Thereafter in the case of the Cattle Raisers Association of Texas, 10 I. C. C. R. 83, the commission held that in view of the unsettled state of the law as to the recovery of claims of reparation, the members of the complaining association should file intervening petitions, each for his own demand.

While there is no requirement in the act that carriers complained of shall produce all of their evidence before the commission, and in numerous cases parties have reserved such evidence until hearing was had in the courts on proceedings instituted by the commission to enforce their orders, the supreme court has said that this was not the proper procedure (162 U. S. 1. c. 196, 40 L. Ed. 935), but that all the testimony should be submitted to the commission for their determination of the questions of fact. The commission has ruled that it is not required to report the details of evidence, but only its findings of fact. See 1 I. C. C. R. 490, 1 Int. Com. Rep. 773, where it said that the report and findings of the commission upon evidence related only to the ascertainment and presentation of all the material facts necessary to clearly and justly present the merits of the controversy, and the commission therefore does not report evidence which is only cumulative, or which is immaterial or irrelevant, or show details of evidence all embraced in the substantial facts stated upon which

the findings and conclusions of the commission are made. As to the effect of the commission's findings upon the questions of reparation in view of the constitutional guaranty of trial by jury, see *infra*, sections 15 and 16.

§ 368 (280). **Reports of decisions.**—The provision for the publication of the reports of the commission was added to the section by the amendment of 1889. There were originally two series of reports containing the opinions of the Interstate Commerce Commission. The Interstate Commerce Reports, cited as "Int. Com. Rep." were published by the Lawyer's Co-Operative Publishing Company of Rochester, New York, and included not only the reports of the commission but also the proceedings of the commission, and the reports of decisions of the courts on interstate commerce questions. The Interstate Commerce Commission Reports, cited as "I. C. C. R.," were first published by L. K. Strouse & Co. of New York.

The Lawyer's Co-operative Publishing Company purchased the other series and continued the publication of what was then the old series of reports of the commission up to and including Volume XIII, June, 1908. Since that time the publication has been assumed and carried on by the government printing office at Washington which has published the reports from Volume XIV to Volume XX, Volume XXI being now (Oct. 1911), issued in advance sheets. The reports now published are cited as I. C. C. R. The five volumes of the discontinued Strouse Series contain the same cases included in Volumes I to IV of the Co-Operative Series.

The reports contain not only the written opinion or reports of the commission but also a list of the cases disposed of by the commission without printed report during the time covered by the volume. Volume XV (1910), contains an appendix and a table of commodities; the transportation whereof was considered in the reports of the commission from Volumes I to XV, that is, during the years 1887 to 1909.

In addition to these published reports of what may be termed the formal opinions of the commission, it issues from time to time, reports of "conference rulings" of the commission, which are made in conference on questions informally raised or submitted in correspondence. It also issues from time to time, as

occasion requires, tariff circulars containing regulations concerning the filing and construction of freight tariffs, classifications and passenger fare schedules, and also concerning the tariffs and classifications of express companies. These bulletins of conference rulings, and tariff circulars are issued as circumstances require, for the information of carriers and shippers, and are printed by the government printing office. Bulletins are also issued quarterly by the commission, containing statements of accidents reported to the commission as required by law, see *infra* Appendix —.

SECTION 15.

§ 369. Section 15 as amended in 1910.

370. The amendments of 1906 and of 1910.

371. The constitutionality of the amendment of 1906 sustained.

372. The enlarged powers of the commission under section.

373. The establishment of through routes.

374. Switch connections and through routing between steam and electric railway.

375. The two year limitation of commission's orders.

376. Selection of the route by the shipper.

377. The advanced rate cases of 1910.

378. Jurisdiction over contracts of carriers.

379. Allowances by carriers for shipper's services must not involve undue preference.

380. The powers of the commission construed.

§ 369. Section 15 as amended in 1910.—SEC. 15. (*As amended June 29, 1906, and June 18, 1910.*) That whenever, after full hearing upon a complaint made as provided in section thirteen of

[Commission may determine and prescribe just and reasonable rates and classifications to be observed as maximum charges.]

this Act, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative (either in extension of any pending complaint or without any complaint whatever) the Commission shall be of opinion that any individual or joint rates or charges whatsoever demanded, charged, or collected by any common carrier or carriers subject to the provisions of this Act for the transportation of persons or property or for the transmission of messages by telegraph or telephone as defined in the first section of this Act, or that any individual or joint classifications, regulations, or practices whatsoever of such carrier or carriers subject to the provisions of this Act are unjust or unreasonable or unjustly discriminatory, or unduly preferential or prejudicial or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate or rates, charge or

[Commission may determine and prescribe just and reasonable regulations or practices. Commission may order carriers to cease and desist from full extent of violations found. Orders of the commission effective as prescribed, but in not less than thirty days.]

charges, to be thereafter observed in such case as the maximum to be charged, and what individual or joint classification, regulation, or practice is just, fair, and reasonable, to be thereafter fol-

lowed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds the same to exist, and shall not thereafter publish, demand, or collect any rate or charge for such transportation or transmission in excess of the maximum rate or charge so prescribed and shall adopt the classification and shall conform to

[Orders shall continue in force not exceeding two years, unless suspended or set aside by commission or court.]

and observe the regulation or practice so prescribed. All orders of the Commission, except orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force for such period of time, not exceeding two years, as shall be prescribed in the order of the Commission, unless the same shall be suspended or modified or set aside by the Commission, or be suspended or set aside by a court

[When carriers fail to agree on divisions of joint rate, commission may prescribe proportion of such rate to be received by each carrier.]

of competent jurisdiction. Whenever the carrier or carriers, in obedience to such order of the Commission or otherwise, in respect to joint rates, fares, or charges, shall fail to agree among themselves upon the apportionment or division thereof, the Commission may, after hearing, make a supplemental order prescribing the just and reasonable proportion of such joint rate to be received by each carrier party thereto, which order shall take effect as a part of the original order.

[Investigation of new schedules.]

Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders, without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the propriety of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the

[Commission may suspend new schedules.]

Commission upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension may suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than one hundred and twenty days beyond the time when such rate, fare, charge, classification, regulation, or practice would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice

goes into effect, the Commission may make such order in reference to such rate, fare, charge, classification, regulation, or practice as would be proper in a proceeding initiated after the rate, fare, charge, classification, regulation, or practice had become

[Commission may extend suspension.]

effective: *Provided*, That if any such hearing can not be concluded within the period of suspension, as above stated, the Interstate Commerce Commission may, in its discretion, extend the time of suspension for a further period not exceeding six months.

[Burden of proof on carrier as to reasonableness of increased rates.]

At any hearing involving a rate increased after January first, nineteen hundred and ten, or of a rate sought to be increased after the passage of this Act, the burden of proof to show that the increased rate or proposed increased rate is just and reasonable shall be upon the common carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

The Commission may also, after hearing, on a complaint or upon its own initiative without complaint, establish through

[Commission may establish through routes and joint rates and classifications.]

routes and joint classifications, and may establish joint rates as the maximum to be charged and may prescribe the division of such rates as hereinbefore provided and the terms and conditions under which such through routes shall be operated, whenever the carriers themselves shall have refused or neglected to establish voluntarily such through routes or joint classifications or joint rates; and this provision shall apply when one of the connecting carriers is a water line. The Commission shall not, however, establish any through route, classification, or rate between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business and railroads of a different character, nor shall the Commission have the right to establish any route, classification, rate, fare, or charge when the transportation is wholly by water, and any transportation by water affected by this Act shall be subject to the laws and regulations applicable to transportation by water.

And in establishing such through route, the Commission shall

[Limitation on through route power.]

not require any company, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith which lies between the termini of such proposed through route, unless to do so would make such through route unreasonably long as compared with

another practicable through route which could otherwise be established.

[Selection of route by shipper.]

In all cases where at the time of delivery of property to any railroad corporation being a common carrier for transportation subject to the provisions of this Act to any point of destination, between which and the point of such delivery for shipment two or more through routes and through rates shall have been established as in this Act provided to which through routes and through rates such carrier is a party, the person, firm, or corporation making such shipment, subject to such reasonable exceptions and regulations as the Interstate Commerce Commission shall from time to time prescribe, shall have the right to designate in writing by which of such through routes such property shall be transported to destination, and it shall thereupon be the duty of the initial carrier to route said property and issue a through bill of lading therefor as so directed, and to transport said property over its own line or lines and deliver the same to a connecting line or lines according to such through route, and it shall be the duty of each of said connecting carriers to receive said property and transport it over the said line or lines and deliver the same to the next succeeding carrier or consignee according to the routing instructions in said bill of lading: *Provided, however,* That the shipper shall in all instances have the right to determine, where competing lines of railroad constitute portions of a through line or route, over which of said competing lines so constituting a portion of said through line or route his freight shall be transported.

[Unlawful to give or receive information relative to rivals' shipments.]

It shall be unlawful for any common carrier subject to the provisions of this Act, or any officer, agent, or employee of such common carrier, or for any other person or corporation lawfully authorized by such common carrier to receive information therefrom, knowingly to disclose to or permit to be acquired by any person or corporation other than the shipper or consignee, without the consent of such shipper or consignee, any information concerning the nature, kind, quantity, destination, consignee, or routing of any property tendered or delivered to such common carrier for interstate transportation which information may be used to the detriment or prejudice of such shipper or consignee, or which may improperly disclose his business transactions to a competitor; and it shall also be unlawful for any person or corporation to solicit or knowingly receive any such information

[Exceptions.]

which may be so used: *Provided,* That nothing in this Act shall be construed to prevent the giving of such information in response to any legal process issued under the authority of any

state or federal court, or to any officer or agent of the Government of the United States, or of any State or Territory, in the exercise of his powers, or to any officer or other duly authorized person seeking such information for the prosecution of persons charged with or suspected of crime; or information given by a common carrier to another carrier or its duly authorized agent, for the purpose of adjusting mutual traffic accounts in the ordinary course of business of such carriers.

[Penalty.]

Any person, corporation, or association violating any of the provisions of the next preceding paragraph of this section shall be deemed guilty of a misdemeanor, and for each offense, on conviction, shall pay to the United States a penalty of not more than one thousand dollars.

[Commission may determine just and reasonable charge or allowance for service rendered by owner of property transported or for any instrumentality furnished by such owner and used in such transportation.]

If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section.

[Enumeration of powers in this section not exclusive.]

The foregoing enumeration of powers shall not exclude any power which the Commission would otherwise have in the making of an order under the provisions of this Act.

§ 370. The amendments of 1906 and of 1910.—This section has been more radically changed by the successive amendments of the act than any other. In its original form, it provided only for a notice to the common carrier to cease from the violation of the act, after the commission had found that such violation had been committed. Under the act as originally framed, this notice was jurisdictional, as it was a necessary basis for a subsequent procedure in court against the carrier to enforce the order of the commission. See 7 I. C. C. Rep. 286.

In the amendatory act of 1906, known as the Hepburn Act, section 15 was in effect re-written, as radical changes were made in the enlargement of the powers of the commission, in empower-

ing it to declare any rate or regulation or practice of a carrier was unjust or unreasonable, and also to determine and prescribe a rate or regulation *in futuro*, to establish through routes under certain conditions, and joint rates and classifications. In 1910, further radical enlargements were made in the powers of the commission, in that it was given authority to investigate any rate increase, and to suspend the same pending investigation, with the burden of proof upon the carrier to show the reasonableness of the increased rate; to establish through routes and joint rates and classifications without the limitation "that no reasonable or satisfactory through routes exists" imposed in the original amendment of 1906; and also empowering the shipper to elect his own through route, and making it unlawful for any carrier to give information concerning rival shipments, and authorizing the commission to determine the just and reasonable allowance for any service rendered by any owner of property transported and for any instrumentality furnished by the owner.

The provision in the original section for a formal notice of the commission's order to the carrier is omitted, as under the succeeding sections the orders, other than for the payment of reparation damages, are made directly enforceable under penalties on the carrier by order of the commission, and a court procedure for enforcement is no longer required.

§ 371. The constitutionality of the amendment of 1906 sustained.—This section as amended by the act of 1906, prior to the amendment of 1910, was held constitutional and valid by the circuit judges of the fifth circuit in *L. & N. R. Co. v. Interstate Commerce Commission*, 184 Fed. 118 (April, 1910). Suit was brought by the railroad company to enjoin the enforcement of the orders of the commission reducing rates and fixing maximum rates between New Orleans and certain other southern cities. 17 I. C. C. R. p. 231. The court said, that the power delegated by congress to the commission to prescribe railroad rates was legislative in its nature, and since it concerned the administrative affairs of the government, which by reason of variable conditions could not be covered in detail by direct legislation, its delegation was not in violation of the constitution and the power may be as fully exercised by the commission, as congress might have exercised it, subject to any limitation imposed by congress itself.

“The provision of the constitution, art. I par. 9, that no preference should be given by any regulation of commerce or revenue to the ports of one state over those of another” did not prevent such exercise of the power of congress by delegated authority to regulate commerce between ports of different states, merely because such regulation may incidentally affect the commerce of a port in still another state.

It was also held that in fixing a maximum rate to be charged by a carrier there was no restriction of the commission in respect to the matters which it may take into consideration, or the weight which it should give to such matters in informing itself what opinion it ought to give, except that it should not abuse its authority and proceed arbitrarily without regard to the justice of the case or give a judgment not fairly within its power.

§ 372. The enlarged powers of the commission.—It was contended before the supreme court in the Illinois Central coal car distribution case, *supra* (1910), that section 15 of the act as amended in 1906 did not empower the Interstate Commerce Commission to make the order regulating coal car distribution and that the power conferred related only to rates which were not involved in this case; but the court said that this contention would frustrate the very purpose for which the amendment was enacted and that the antecedent construction which the Interstate Commerce Act had necessitated and the remedial character of the amendments of 1906 all served to show the want of merit in this contention. The court, therefore, held that the Commission was fully empowered under the act as amended in 1906 to make the order regulating coal car distribution.

In the “general damage” case, 17 I. C. C. R. 361 (1909) it was said that section 15 was the dominating and controlling expression of the real object and meaning of the act in its present form, and that it made of the commission what it was undoubtedly intended to be, a special expert body created for the purpose of dealing with the rates and rules, regulations and practices of carriers affecting rates. In this case the commission said that since its original enactment the act to regulate commerce had been amended many times, without being redrafted as a whole in order to bring its various provisions into harmony with one another, and the result was the act was not free from inconsistencies, and that some times doubt arose as to its real meaning; and by way of

illustration it was shown that the supreme court had been compelled in the Abilene Coal case to read out of the act certain language of sections 8, 9 and 22, in order that the act should not destroy itself. See *supra*, sec. 9.

The commission, prior to the amendment of 1906, was an investigating administrative board, its recommendations being enforced only by the action of the courts; while under the amendments of 1906 and 1910 primarily in this section 15, it has not only the *quasi* judicial power of determining what existing rates and regulations are unreasonable and also of suspending the taking effect of an increased rate pending the investigation thereof, but also the essentially legislative and administrative power of substituting therefor a rate and regulation *in futuro*; and its conclusions and orders are directly enforceable by penalties unless suspended or set aside by the action of the court invoked by the carrier. This power of the commission to determine the reasonableness of an existing rate or regulation is incidental and essential in fixing a reasonable rate or regulation for the future.

It was held in *N. Y. C. & H. R. R. Co. v. Interstate Commerce Commission*, *supra*, that the commission has authority under this amended section to make an order that a carrier shall cease and desist from violating the Interstate Commerce Act to the extent to which the commission finds that such violation exists; and where discrimination exists, it may prescribe a relative rate, instead of a maximum rate, which will enable the carrier to discontinue the discrimination without reducing the rate to other shippers or to other commodities, and that the commission was not required to prescribe doubtful regulations and remedies which are not necessary to remove the discrimination, and that it may properly authorize the carrier to make such regulation should the necessity arise. In this case the court made an order that the complainant, a New York miller, was entitled to a milling in transit rate given western shippers for purposes of export.

§ 373. The establishment of through routes.—In more than one instance, the amendments in the act of 1910 were the result of the judicial construction of the provisions of the act of 1906. Thus in the section as amended in 1906, the commission was authorized to establish an additional through route when no reasonable or satisfactory through route existed, and the commission

acting thereunder, 16 I. C. C. Rep. 300, established a through route and joint rate for passenger travel between points in the northwestern part of the state of Washington to eastern destinations via Portland, and this order was resisted in the courts upon the grounds that there was already in existence a reasonable and satisfactory through route. It was held by the supreme court in *Interstate Commerce Commission v. Northern Pacific Ry. Co.*, 216 U. S. 538, 54 L. Ed. 608 (1910), that this condition whether a reasonable or satisfactory through route existed was jurisdictional, and the conclusion of the commission was subject to review by the courts, and that the personal preferences of travelers for a more southern route to the Pacific were not sufficient to justify the order, and the judgment of the circuit court enjoining the enforcement of the commission's order was affirmed.

In the amendment of 1910, this provision as to the reasonableness of an existing route was stricken out, and the commission was given authority to establish, either on a complaint or upon its own initiative, through routes and joint classifications and joint rates, and the terms and conditions under which those through routes shall be operated, whenever the carriers shall have failed or refused to voluntarily establish such through routes and classifications and joint rates; and this provision applies when one of the connecting carriers is a water line.

Other limitations in the right of the commission to order through routing remain. The commission can not require a company, without its consent, to embrace in the route substantially less than the entire length of its railroad, etc. This provision has not been construed by the courts or the commission. There is also a limitation as to the through routing between street electric passenger railways and others which has been construed by the commission. See § 374, *infra*. See also the annual reports of the commission on this subject. Report of 1909, page 36; report of 1910, page 19.

§ 374. Switch connections and through routing between steam and electric railway.—The authorization of the commission to establish through routes and joint rates and classifications is subject to the proviso that the commission shall not establish any "through route classification or rate between street electric passenger railways not engaged in the general business of trans-

porting freight in addition to their passenger and express business and railroads of a different character." The commission, in 20 I. C. C. R. 486, construed the section with this proviso as authorizing through routes and joint rates between a steam railroad and a street electric railway where the latter has a freight as well as a passenger traffic. The commission said that it was the purpose of congress to widen the scope of the powers of the commission to establish through routes and joint rates rather than to narrow them, and to leave in the commission full discretion to act in such cases in the light of all the facts and circumstances and do what may seem fair, reasonable and equitable in the case.

In this case, that of an electric railroad in Ohio, the commission said that it was immaterial that the electric street railway had no right under the state law to demand a switch connection and an interchange of traffic with a steam railway. Such a limitation was only controlling as to local traffic, and could not be permitted to operate as an impediment to the movement of interstate traffic, where congress had legislated upon the subject by requiring such connection and interchange under certain conditions, which in this case were shown to exist.

The commission said that it would not ordinarily lend its aid to an effort by the carrier to secure traffic that was reasonably tributary to another line, but on the other hand it was unfair to impose upon shippers the burden of an unduly long wagon haul. The commission therefore denied through routes and through billing to points on the complainant's line where it paralleled and closely approached the tracks of one or more of the defendants, but required on the special facts of the case in the interest of the shippers connections at other points from five to ten miles distant by the wagon roads. The commission said that the case did not justify requiring the defendants to go to the expense of printing their tariffs and getting the concurrence of their connections in new joint through rates to and from the local points on complainant's line, and said that it would be sufficient for complainant to file its local rates with the commission, which would make them applicable under the rules on through interstate movements.

§ 375. The two year limitation of commission's orders.—
The statute as amended provides that all orders of the commis-

sion, excepting orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force for such period of time, not exceeding two years, as shall be prescribed in the order of the commission. The effect of this limitation in time is to give the carrier freedom at the expiration of the time to exercise his own initiative as to matters affected by the order. This was illustrated in a case recently decided by the supreme court, *supra*, § 238, known as the Trade Zone Case, wherein the order of the commission, directing the reduction of class rates from East St. Louis to Kansas City when applied to business from the Atlantic seaboard on the ground that the through rates of the Missouri River cities were too high and unreasonable, was finally affirmed by the supreme court only ten days before the expiration of the two years' limitation of the two years' order; and immediately upon that expiration the rate thus adjudged unreasonable was restored by the railroads. See commission's report 1909 p. 33, and 1910 p. 16.

An order of the commission relating to rates is not invalidated because it fails to prescribe the time it shall remain in force; but in such case the order remains in force for two years. *N. Y. C. & H. R. R. Co. v. Interstate Commerce Commission*, circuit court of N. Y., 168 Fed. 131 (1909).

An appeal from a decree dismissing a suit to enjoin the enforcement of an order of the commission requiring a carrier to desist from granting a shipper an alleged undue preference, will not be dismissed by the supreme court as presenting merely a moot case because the period of two years during which the order was by its term continued, had expired. See *Southern Pacific Terminal Co. et al. v. Commission*, 219 U. S. 498, 55 L. Ed. — (1911). The court said that notwithstanding this limitation the orders of the commission were in one sense continuing and might be the basis of further proceedings by way of reparation, and that otherwise the parties would have their rights determined without a chance of redress. The same ruling was made in *Southern Pacific Co. v. Commission*, 219 U. S. 433, 55 L. Ed. — (1911), where the court reversed the circuit court, northern district of California, in their opinion in 177 Fed. 963, which sustained the order of the commission, 14 I. C. C. R. 461, and held the order void, though more than two years had elapsed since it became effective.

§ 376. Selection of the route by the shipper.—The supreme court had held in the Southern California Fruit Case, (*supra* § 300), that the control of through routing by the carrier as a condition of granting a through rate was not violative of any section of the Interstate Commerce Act. It is provided in this section by the amendment of 1910, that the shipper shall have the right to select his own through route, where there are two or more and to designate in writing by which of said through routes his property shall be transported to its destination. It is made the duty of the carrier, and of each of the connecting carriers, to receive and transport the property accordingly.

§ 377. The advanced rate cases of 1910.—In June, 1910, prior to the enactment of the amendatory statute of that year the principal carriers in the Western Trunk Line Territory through their agents acting in unison prepared and filed tariffs increasing their rates upon a number of important articles. Before these rates had gone into effect the attorney general of the United States caused suit to be brought in the circuit court of the United States in the eighth circuit at Hannibal, Missouri, alleging that such increased rates were the result of a combination and conspiracy in restraint of trade and in violation of the Sherman Anti-Trust Act. A temporary injunction having been secured against putting these rates in effect, the carriers thereafter agreed to suspend the effectiveness of the rates pending a determination of their reasonableness by the Interstate Commerce Commission. This agreement was made in view of the bill then pending in congress vesting in the commission the power under this section 15 to suspend advanced rates. When the bill became law the carriers refiled their tariffs, but their taking effect was suspended by the commission pending the investigation.

Similar advances were attempted in what is known as the official classification territory including the territory in the northeastern section of the United States, east of the Mississippi River and north of the Ohio and Potomac Rivers. These carriers also suspended the advances pending the investigation by the commission.

These advances were sought to be justified in both these cases on the ground of the increased cost of operation and the very general advance in wages. In both cases (20 I. C. C. R. 243, and

20 I. C. C. R. 307), it was ruled (Feb. 22, 1911), that the burden being upon the carriers to establish the reasonableness of the advanced rates, that they had failed to justify such increased rates. It was ruled also that the provision of this act differed from the English act, that under that statute the railway company need only prove that the increase of rate was unreasonable, while under the act to regulate commerce the carrier is called upon to prove that the new rate as a whole is reasonable.

In both cases it was ruled, that before any general advance of rates could be permitted it must appear with reasonable certainty that carriers had exercised proper economy in the purchase of their supplies, in the payment of their wages and in the general conduct of their business. In the Official Classification Case it was ruled that class rates had been continuously in effect for thirty years and their business had become adjusted to them while the situation was somewhat different with reference to commodity rates, and it was intimated that these rates might with justice be revised in some cases. The carriers were requested in both cases to withdraw their proposed tariffs, such action being without prejudice to the carriers, if changed conditions should be submitted to the commission.

§ 378. Jurisdiction over contracts of carriers.—While the commission has no general common law or equity jurisdiction and has no concern with the contractual relation of carriers other than with shippers and relating to transportation, it is especially authorized under this section as amended in 1906 to determine the just and reasonable charge or allowance for services rendered by a shipper to the carrier. This power was doubtless conferred to prevent the concealment of rebates or other discriminations or preferences to favored shippers in the guise for payments of services. The provision was strongly recommended by the commission in its annual report for 1905, where it says that there was no doubt that the payment of extravagant sums for such services was resorted to for the purpose and with the effect of preferring one shipper to another. It said also that this remedy will not be altogether adequate, and that any remedy was extremely difficult of application, but that nothing better appeared to be available.

This section has no application to the case of a contract made

by a carrier with a third party. This was ruled in the case, 17 I. C. C. R. 98, where complaint was made of allowances made to a warehouse company which was not the owner of the cotton which was there compressed and stored; and it was ruled that the mere fact that the owners of a majority of the stock were also shippers of freight did not show a violation of the act and did not make the allowance one for services rendered by a shipper to the carrier within the meaning of this provision.

This provision was invoked by the General Electric Company, 14 I. C. C. R. 238, which asked the commission to determine and fix the just and reasonable rates for the services which it rendered to the railroad in the industrial tracks upon its plant which it owned and operated and wherewith it hauled the loaded and empty cars to the main track. The commission ruled that the complainant did nothing within its plant enclosure which it could lawfully call upon the defendants to do for it, and therefore nothing for which it could lawfully demand compensation. It was claimed in this case that the railroad company had incurred contractual obligation by its course of conduct, but the commission said it had no power under the law either to enforce the specific performance of contracted obligations or to award damages for the breach of any such agreement.

§ 379. Allowances by carriers for shippers' services must not involve undue preference.—As this provision of the statute was enacted for the purpose of preventing concealment of rebates or other discriminations or preferences the commission has carefully examined such allowances when brought before it and has insisted that no such allowances can be recognized in favor of one shipper when a similar allowance is refused to another shipper competing in the same market and in the same line of business who offers to provide a similar facility and perform the same service in the transportation of his property. This principle was applied in the Federal Sugar Refining Company Case, involving an allowance made by railroads to the competitors of the Refining Company for lightering services in New York harbor. This case was twice before the commission. 17 I. C. C. R. 40, 20 I. C. C. R. 200. There was a difference of opinion as to the application of this principle to the facts in the case; but on the second hearing it was ruled by the majority that the allowance paid by the de-

fendant railroads for the sugar brought by Arbuckle Brothers on floats and lighters to the regular railroad freight stations on the Jersey shore, no allowance being paid to complainant on sugar being brought by it on lighters to the same station, was unduly prejudicial to the complainant. Commissioners Prouty and Knapp dissenting said that the disadvantage under which complainant was laboring in regard to its lighterage was owing to its location at Yonkers outside of the lighterage limit.

There is no undue preference however when a carrier makes with one independent company a contract more favorable than with another for a service, which that carrier is bound or undertakes to perform. The act deals only with the obligation of carriers as carriers, and in no way attempts to regulate or interfere with other matters not involving their duty to shippers or passengers as such. The principle has no application to exclusive contracts for station facilities and the like. See § 287, *supra*.

§ 380. The powers of the commission construed.—It was said by the commission prior to the amendment of 1910 (17 I. C. C. R. 369), that this section in their judgment was the determinating and controlling expression of the real object and meaning of the act in its present form; and by the supreme court in the Pitcairn Coal Case, *supra*, after the amendment of 1906, but before that of 1910 that “the commission is empowered” indeed it has made its duty in disposing of a complaint, not only to determine the legality of the practice alleged to give rise to unjust preference or undue discrimination, and to forbid the same, but moreover to direct the practice to be followed as to such subject for a future period, not exceeding two years, with a power in the commission if it finds reason so to do, to suspend, modify or set aside the same, the order being operative without judicial action.

The powers of the commission have been sustained in lowering the through rates between the Atlantic seaboard and Missouri river though such lowering involved the changing of the basing points theretofore adopted by the carriers (see *supra*, § 238).

In enforcing an equitable distribution of the supply of coal cars, when there was a shortage of cars available for the business of the shippers. See *United States ex rel. v. B. & O. R. Co.*, 215 U. S. 481, 54 L. Ed. 292 (1910).

In ordering the discontinuance of a discrimination in the grant of a milling in transit privilege, *supra*, § 234.

In directing a carrier to desist from further charging the freight rate under certain classification, which produced preferences and discriminations. See Cincinnati, H. & D. F. Co. Case, *supra*, § 275.

In directing a railroad to discontinue undue preferences and advantage to a party under a lease of the wharves of a terminal company at Galveston. Southern Pac. Lum. Co. v. Commission, *supra*, § 248.

SECTION 16.

- § 381. Section 16. Enforcement of orders.
- 382. The amendments of 1906 and 1910.
- 383. The saving of the right of trial by jury.
- 384. The time limitations of actions for reparation.
- 385. Commission must find reasonable rate before ordering reparation.
- 386. Jurisdiction of commission in awarding reparation.
- 387. The jurisdiction of the commission in awarding general damages.
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- 389. Prima facie effect of commission's orders in reparation.
- 390. The procedure in actions in court.
- 391. The judicial review of the commission's orders.
- 392. The jurisdiction of the circuit courts.
- 393. The right of appeal under amended act.
- 394. Jurisdiction of the courts to review the orders of the commission.
- 395. The commerce court on parties entitled to appeal from commission's orders.
- 396. The finality of the order of the commission.

§ 381. Section 16. Enforcement of orders.—Sec. 16. (*Amended March 2, 1899, June 29, 1906, and June 18, 1910.*) That if after
 [Award of damages by commission.]

hearing on a complaint made as provided in section thirteen of this Act, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

[Petition to United States court in case carrier does not comply with order for payment of money.]

If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the circuit court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any state court of general jurisdiction having jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages, and the order of the Commission in

[Findings of fact of commission shall be prima facie evidence in reparation cases.]

the premises. Such suit in the circuit court of the United States shall proceed in all respects like other civil suits for dam-

ages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts

[Petitioner not liable for costs in circuit court.]

therein stated, and except that the petitioner shall not be liable for costs in the circuit court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the

[Petitioner's attorney's fees.]

petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. All complaints for the recovery of damages shall be filed with the Commission within two years from the time the

[Limitation upon action.]

cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the circuit court or state court within one year from the date of the order, and not after.

[Joint plaintiffs may sue joint defendants in courts on awards of damages.]

In such suits all parties in whose favor the Commission may have made an award for damages by a single order may be joined as plaintiffs, and all of the carriers parties to such order awarding such damages may be joined as defendants, and such suit may be maintained by such joint plaintiffs and against such joint defendants in any district where any one of such joint plaintiffs

[Service of process.]

could maintain such suit against any one of such joint defendants; and service of process against any one of such defendants as may not be found in the district where the suit is brought may be made in any district where such defendant carrier has its principal operating office. In case of such joint suit the recovery, if any, may be by judgment in favor of any one of such plaintiffs against the defendant found to be liable to such plaintiff.

[Service of order of commission.]

Every order of the Commission shall be forthwith served upon the designated agent of the carrier in the city of Washington or in such other manner as may be provided by law.

[Commission may suspend or modify order.]

The Commission shall be authorized to suspend or modify its orders upon such notice and in such manner as it shall deem proper.

[Carriers, their agents and employees, must comply with such orders.]

It shall be the duty of every common carrier, its agents and employees, to observe and comply with such orders so long as the same shall remain in effect.

Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who

[Punishment by forfeiture for refusal to obey order of commission under section 15.]

knowingly fails or neglects to obey any order made under the provisions of section fifteen of this Act shall forfeit to the United States the sum of five thousand dollars for each offense. Every distinct violation shall be a separate offense and in case of a continuing violation each day shall be deemed a separate offense.

[Forfeiture payable into treasury and recoverable in civil suit.]

The forfeiture provided for in this Act shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States, brought in the district where the carrier has its principal operating office, or in any district through which the road of the carrier runs.

[Duty of district attorneys to prosecute.]

It shall be the duty of the various district attorneys, under the direction of the Attorney-General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses

[Costs and expenses to be paid out of appropriation for court expenses.]

of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

[Commission may employ attorneys.]

The Commission may employ such attorneys as it finds necessary for proper legal aid and service of the Commission or its members in the conduct of their work or for proper representation of the public interests in investigations made by it or cases or proceedings pending before it, whether at the Commission's own instance or upon complaint, or to appear for and represent the Commission in any case pending in the commerce court; and the expenses of such employment shall be paid out of the appropriation for the Commission.

[Petition to commerce court in cases of disobedience to order of commission other than for payment of money.]

If any carrier fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Interstate Commerce Commission or any party injured thereby, or the United States, by its Attorney-General, may apply to the Commerce Court for the enforcement of such order. If, after hearing, that Court determines that the order was regularly made and duly served, and that the carrier is in disobedi-

[Commerce court must enforce disobeyed order if regularly made and duly served.]

ence of the same, the Court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such carrier, its officers, agents, or representatives, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

The copies of schedules and classifications and tariffs of rates,

[Rate schedules, contracts, or agreements, and carriers' annual reports filed with commission and in custody of secretary are public records, receivable in courts and by the commission as prima facie evidence. Certified copies or extracts therefrom also prima facie evidence.]

fares, and charges, and of all contracts, agreements, and arrangements between common carriers filed with the Commission as herein provided and the statistics, tables, and figures contained in the annual or other reports of carriers made to the Commission as required under the provisions of this Act shall be preserved as public records in the custody of the secretary of the Commission, and shall be received as prima facie evidence of what they purport to be for the purpose of investigations by the Commission and in all judicial proceedings; and copies of and extracts from any of said schedules, classifications, tariffs, contracts, agreements, arrangements, or reports, made public records as aforesaid, certified by the secretary, under the Commission's seal, shall be received in evidence with like effect as the originals.

§ 382. The amendments of 1906 and 1910.—This section was also in effect re-written in the amendatory act of 1906 and substituted for the original section, this being necessitated by the radical changes in the powers conferred upon the commission in the preceding section. The original section provided for the enforcement of the orders of the commission by the courts on the petition of the commission, the findings of fact by the commission being prima facie evidence of the matters therein stated, and under the amendment of 1889, the saving of the right of trial by the jury under the seventh amendment of the constitution.

The amendments of 1906 provided for the filing of reparation complaints, for a limitation of time in bringing actions, for the service of the order of the commission by mailing, with penalties upon the carriers for non-observance of the orders, the employment of special counsel, the enforcement of orders for reparation, the venue of suits against the commission the application of the provisions of the expediting act, the regulation of the procedure and the granting of interlocutory orders in suits against the commission, and for appeals to the supreme court from final as well as interlocutory orders in such suits, and for the use of schedules, tariffs and tables as evidence.

The act of 1910 provided for the institution of suits for reparation in state courts, for service upon the agent of the carrier at Washington in lieu of the service by registered mail, for the em-

employment of official attorneys by the commission, whereas in the act of 1906 it was with the consent of the attorney-general that special counsel was employed.

The provisions of the act of 1906 as to suits against the commission were omitted in view of the creation of the commerce court under the same act.

§ 383. The saving of the right of trial by jury.—The seventh amendment of the constitution provides that in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise examined in the courts of the United States than according to the rules of the common law. The amendment of 1889 of the original act was made in view of the express requirement in section 14 of the original act, that the commission should make recommendation as to what reparation, if any, should be made by the carriers as to any party or parties who may have been found to have been injured.

As to the application of the original act, that is, prior to the amendment of 1906, in actions of reparation, see *Interstate Commerce Commission v. R. R. Co.*, 82 Fed. 192, W. D. of Pennsylvania (1897), wherein the court ruled that each shipper had a right to reparation and damages as a separate legal controversy which would entitle him to a trial by jury when in excess of twenty dollars. In the *Texas Cattle Raisers Case*, 10 I. C. C. R. 83 (1904), this question was considered by the commission, and it was said that it had been the practice of the commission to order reparation in behalf of the members of complaining associations; but it was suggested as the law was unsettled that the members of the association should file separate intervening claims.

Under the act as amended suits for reparation, wherein orders for the payment of money are made, are brought in the circuit court of the United States or in any state court having jurisdiction of the parties; and such a suit in the circuit court of the United States proceeds in all respects like other civil suits for damages, except that on the trial of such suit the finding and order of the commission shall be prima facie evidence of the facts therein stated; and the petitioner is not liable for costs in the circuit court nor subsequently except upon his own appeal; and

if he prevail, is allowed a reasonable attorney's fee. The right of trial by jury is thus preserved.

While the statute provides for the joining as plaintiffs of all parties in whose favor the commission may have made the award for damages by a single order, it would seem that the constitutional right of trial by jury where the demand exceeds twenty dollars, would require a separate trial for each separate claimant if he demanded, and that the procedure would have to be adapted thereto.

Under the new judicial code, wherever reference is made to the circuit court of the United States in this section as a trial court, the reference will be deemed and held to confer the power and impose the duty upon the district court after the code takes effect on January 1st, 1912.

§ 384. The time limitation of actions for reparation.—There was no provision in the Interstate Commerce Act before the amendment of 1906, prescribing a limitation of time within which actions in court or proceedings before the commission should be commenced. The discussions therefore prior to this time of this question of limitation, whether in the commission or the court, have now only an historical interest. Under the section as amended complaints for recovery of damages must be filed with the commission within two years after the cause of action accrues, and not after, and suit thereon must be filed in the circuit court or state court within one year of the date of the order of the commission and not later. This limitation was applied by the commission in its ruling in 19 I. C. C. R. 592, where the complaint included shipments covering an extended period of time, and said that it would only consider such shipments as moved within two years prior to the time the complaint embracing them was filed, and that with respect to shipments moving prior to such two year period the commission believed that they were without jurisdiction and therefore, made no finding whatever.

§ 385. Commission must find reasonable rate before ordering reparation.—It was held by the circuit court of appeals, eighth circuit, in *Denver R. G. R. Co. v. Baer Bros. Mercantile Co.*, 187 Fed. 485 (May, 1911), that in a proceeding before the Inter-

state Commerce Commission to recover damages on a complaint by a shipper that the amount collected by the carrier at a lawful established rate has been excessive because that rate was unreasonable, the finding and prescription by the commission of a reasonable maximum rate to be observed by all and an order by the commission prohibiting the use of a rate in excess thereof, as provided in section 15, were conditions precedent to the exercise of the power under section 16 to order reparation. The court said that an order of reparation without such an establishment of a reasonable maximum rate was beyond the power of the commission and void, and as no rate was prescribed and no rate forbidding the future use of an excessive rate was made in the case, the commission's order of reparation was beyond its power and void. The court therefore reversed the judgment rendered in the circuit court without considering the other questions raised in the case.

§ 386. The jurisdiction of the commission in awarding reparation.—The commission has ruled that its award of reparation is simply a recommendation which can only be enforced by a suit at law affording full opportunity for a jury trial, and that upon this theory the act giving them this authority is valid and constitutional. 10 I. C. C. R. 83. Reparation, the commission has said, should not be awarded in any informal proceedings which would not be awarded under the same state of facts in a contested case and in the face of defendant's protestation instead of its admission. The commission, therefore, could not accept as conclusive any stipulation of parties as to the reasonableness of a rate or transportation regulation. 16 I. C. C. R. 426. The right to reparation is not confined to shipments made by parties to any given proceeding, but extends to all shipments moving under the same circumstances and conditions and charged for on the basis found to be unlawful by whomsoever made. 17 I. C. C. R. 253.

It was ruled by the commission, in 17 I. C. C. R. 90, that where a transportation service has been rendered for which no tariff authority exists, and where the shipper has paid the sum claimed by the carrier for that service, the commission has jurisdiction to inquire what was the reasonable charge for that service.

In this case the extra service was for ice and refrigeration. (Commissioner Cockrell dissented on the ground that the com-

mission had no power under the act to inquire into the value of service rendered by the carrier independently of a rate lawfully fixed by the carrier for such service.)

On the general question of the jurisdiction of the commission to award reparation it was said by the supreme court, in the *Abilene Cotton Oil Case*, *supra*.

“Although an established schedule of rates may have been altered by a carrier voluntarily or as the result of an enforcement of the order of the commission to desist from violating the law rendered in accordance with the provisions of the statute, it may not be doubted that the power of the commission would nevertheless extend to hearing legal complaints of and awarding reparation to individuals for wrongs unlawfully suffered from the application of the unreasonable schedule during the period when such schedule was in force.” See also 15 I. C. C. R. p. 334.

In 15 I. C. C. R. 147, decided in 1909, the commission said that in passing upon the reasonableness or unreasonableness of a rate it acted as an administrative body having *quasi* judicial functions; when it determines what the rate should have been and shall be in the future it exercises certain legislative functions. When it computes the damages or reparation due the shipper by reason of the enforcement and collection of a rate unreasonable to the extent that it exceeds a rate which is declared to be reasonable, there is a mathematical determination of the damages of the shipper should receive, and that elements of conjecture, speculation and inference are entirely eliminated. It said further that the commission did not assess costs or allow attorneys’ fees, nor did its order for the payment of money have the effect of a judgment of the court. Such orders were not enforceable by process nor did they become liens upon the property of the defendant.

§ 387. Jurisdiction of the commission in awarding general damages.—While the commission has uniformly awarded damages in reparation, where the subject matter of the complaint was an unreasonable rate and the award was merely a matter of calculation there has been a difference of opinion in the commission as to its jurisdiction or its duty to award damages in demands for reparation other than those which could be ascertained

by mere calculation of differences in rates. The question has been presented in two classes of cases: first, where an individual claimant suffered loss in business through delays in consequence of defaults of the carrier which are in contravention of some provision of the act, and second, where the complainant is one of a class of shippers, who are damaged by some rule or regulation declared discriminatory by the commission. In a case of the first class, 17 I. C. C. R. 361, the majority of the commission declined to take jurisdiction saying that the award of such resulting damages, loss of trade and the like should be determined by action brought in a court of competent jurisdiction. It was conceded that the language of the act was of doubtful interpretation, and therefore the commission, being a special tribunal of limited powers, should resolve the doubt in favor of courts where claims of this nature ordinarily belong. The minority opinion, in which three commissioners concurred, was that the decision of the majority was a surrender of jurisdiction clearly conferred and theretofore exercised without question.

The ruling in this case was considered by the circuit court of appeals, third circuit, in the *Morrisdale Coal Case*, *supra*, § 331, which involved a claim for damages on account of a prejudicial distribution of coal cars, wherein the court declined jurisdiction on account of the ruling of the supreme court in the *Abilene Coal Case*, as the rule claimed to be discriminatory had not been passed upon by the commission; and the court intimated that the letter of the statute seemed to confer upon the commission the power to assess damages in every case of discriminatory practices. Its procedure, said the court, in making the assessment, constitutes no part of judicial procedure. In a court of law its findings and order are but *prima facie* evidence of the damages sustained.

In a later case the subject came again before the commission in the other class of cases involving claims for damages on account of the discriminating rule of distributing coal cars in time of shortage by the Pennsylvania Railroad, which was found by the commission to be illegal and discriminatory as against a class of shippers. These were the same coal car distribution rules that were involved in the litigation in the *Morrisdale Coal Company Case*, wherein the circuit court and the circuit court of appeals declined to take jurisdiction. The majority of the commission,

19 I. C. C. R. 356, were still of the opinion that it was not for them under the law to assess and determine the damages sustained by the complainant, and that it was a judicial question for the courts, and at the most any finding by the commission as to the amount of damages would be the expression of an opinion that could not be enforced by the commission, and therefore in any event resort must be had by the complainant to the courts.

Commissioner Prouty, in a dissenting opinion, considered that there was a clear distinction between the former case (17 I. C. C. R. 361), which he said was a case of individual wrong, which could be redressed in court consistently with the position declared in the Abilene Case, and this case, wherein discrimination inhered not against a particular shipper, but under a rule applicable to all shippers and therefore peculiarly within the jurisdiction of the commission.

The commission concluded in view of this position of the courts (at this time the opinion of McPherson, J., in the circuit court, 176 Fed. 748 [1910], was before the commission but the opinion of the circuit court of appeals had not then been reported) to order a further argument with respect to the amount of damages suffered by the complainant in the proceedings as the result of the discriminations that were found to exist. For discussion of the jurisdiction of the courts in such cases, see *supra*, § 331.

The jurisdiction of the commission in awarding reparation seems to extend under the act to all cases where parties are prejudiced by any rate or regulation of the carrier which is declared by the commission unreasonable or prejudicial. There seems to be no basis for distinction in the ascertainment of damages—if they are proximate so as to be cognizable in law, and not consequential, that it, speculative—because they require weighing of evidence, and are not determined by merely a calculation of the figures of rates. In any case the award of the commission is only advisory and must be confirmed by the court.

§ 388. Jurisdiction of federal and state courts in reparation actions.—Under the section as amended in 1910 the complainant in a reparation case, or any person for whose benefit the order is made, may bring the suit for the damages awarded by the commission in “any State Court of general jurisdiction having jurisdiction of the parties.” The section specifically provides for the

procedure in the suit, if brought in the circuit court of the United States, that is, that it should proceed like other civil suits for damages; that the finding and order of the commission shall be prima facie evidence of facts and further provides as to liability for costs, taxation of attorney's fee, and the joinder of parties both as plaintiffs and defendants. The limitation provision requires that the suit must be filed in the circuit court or state court within one year from the date of the order. Such a suit, if brought in the state court, would necessarily be controlled in its procedure by the law of the forum. Whether a state court would be bound to assume jurisdiction of a cause of action created by federal statute, see *supra*, § 48, on Federal Actions in State Courts, also *Hoxsie v. N. Y., N. H. & H. R. Co.*, 82 Conn. 352. In the suits in the circuit courts of the United States for the recovery of reparation damages there is no exception to the general provision of the judiciary act requiring \$2,000* as a minimum amount in controversy. The suit if brought in the circuit court of the United States proceeds in all respects like other civil suits for damages in that court subject to the provision of the section. The provision in the section for the joining of parties as plaintiffs who may be awarded damages by a single order of the commission may have been inserted on account of this jurisdictional amount in controversy required by the judiciary act, and in case of such joinder it would seem that the aggregate of the claims thus authorized to be included in the action would be the amount in controversy. In suits for reparation the action may be brought by the party making the complaint, or by the party for whose benefit the order is made.

§ 389. The prima facie effect of the commission's orders.—The complaints for reparation are now the only cases wherein the commission is required under section 14 to report its findings of fact, and where their report with the findings of fact is made prima facie evidence. The subject of the prima facie effect of the findings of fact by the commission was considered by the circuit court of appeals of the third circuit in a reparation case, *W. N. Y. & P. R. Co. v. Penn. Refining Co.*, 137 Fed. 343, in 1905, under the act before its amendments. The court, while

* \$3,000.00 is the jurisdictional limit under the new Judicial Code which takes effect January 1, 1912.

sustaining the constitutionality of the provision as within the power of congress in regulating the rules of evidence, held that it was only the findings of fact which the law made prima facie evidence, and that the opinions and arguments and regulations of the commission were not made prima facie evidence, or evidence of any kind in any judicial proceedings. The findings of fact must therefore be offered in evidence, unaccompanied with extraneous matter calculated to confuse or mislead. The causes of action in the case of reparation must be included in an order of reparation made by the commission. It was held in this case also that the receivers of a railroad who had been finally discharged before the making of the order of reparation, were not liable.

§ 390. The procedure in actions in court.—Before the amendment of 1906 the aid of the courts was necessary to enforce the orders of the commission other than for the payment of money. After that amendment the orders of the commission were directly enforceable, but with jurisdiction in the courts to enjoin or suspend any order of the commission. This jurisdiction of the circuit courts over the orders of the commission under the act of 1910 is now vested in the commerce court.

The only suits under the act as amended to be brought in the circuit court are those to enforce the reparation orders of the commission, wherein the state court will have concurrent jurisdiction, and also, it may be added, suits in circuit courts to recover penalties from the carriers for disobedience of other orders. Under the new federal code of procedure, this jurisdiction is vested in the district courts.

Under this new procedure the decisions as to the necessary and proper parties and the procedure in the circuit court which were rendered before the amendment of the act have only a limited application. In the *Texas & Pacific Case*, 162 U. S. 197, 40 L. Ed. 940, *supra*, it was held by the supreme court that the Interstate Commerce Commission was a body corporate, with the legal capacity to be a party plaintiff or defendant in the federal courts and that proceedings in the circuit courts to enforce the orders of the commission could be filed by any person interested therein or by the commission itself as the party complainant.

It was also held that testimony in the circuit court was not limited to that taken before the commission, that is, either party may introduce other testimony, see *N. O. & T. P. R. Co. v. Com-*

mission, 162 U. S. 184, 40 L. Ed. 935. The supreme court however expressed disapproval of such a method of procedure on the part of the railroad companies, in withholding a large part of their evidence from the commission, and first introducing it in the circuit court, and said that the purposes of the act called for a full inquiry by the commission in the first instance. It was uniformly held in such suits to enforce the orders of the commission that the burden rested upon the railroad to show the orders to be erroneous. See *Commission v. S. N. Ry. Co.*, 102 Fed. 709; and *Same v. C., B. & Q. R. Co.*, 94 Fed. 272.

It was held in *Nayler v. Lehigh Valley R. Co.*, 188 Fed. 860 (1911), C. C. Pa., that a suit to enforce an order for reparation was one in tort for damages, and that the State Procedure Act requiring affidavits of defense in suits upon contracts did not apply to such a proceeding.

§ 391. The judicial review of the commission's orders.—When the amendatory act of 1906 was before congress, the question of the regulation and the exercise of the judicial power in enjoining and suspending any order or requirement of the commission, was the subject of extended discussion, and the provisions of the act of 1906, including suits against the commission, were the result of a compromise between the opposing parties of what was called the "broad review" and a "narrow review." Under the act as amended in 1906, provision was made for the filing of these suits to set aside, annul or suspend any order of the commission in the districts, where the carrier against whom the order or requirement was made had its principal operating office, and jurisdiction to determine such suits was vested in the circuit courts; and under the provisions of the Expedition Act, which was made applicable, finally determined in the circuit court by the circuit judges of such circuit and appealed directly to the supreme court. A number of cases have been determined both in the circuits, and some by the supreme court, which have been cited in connection with different subjects involved.

The amendatory act of 1910 provided also for the establishment of the commerce court (Appendix), and that court was vested with jurisdiction of all cases brought to enjoin, set aside, annul or suspend in whole or in part any order of the commission. All of the provisions of the act of 1906 regulating the venue in such suits are omitted in the re-enacted section of 1910.

§ 392. The jurisdiction of the circuit court.—The suit of the party claiming reparation under an order of the commission is to be brought in the circuit court of the United States in the district, wherein he resides and in which is located the principal operating office of the carrier, or through which the road of the carrier runs. In *Interstate Commerce Commission v. W. N. Y. & Pa. R. Co.*, 82 Fed. 192, the court said that the violation within the judicial district of an order of commission by any one of the defendants or one of the parties to a common arrangement for interstate shipments, was violation or disobedience of all the parties defendant, where the parties were all acting under a common arrangement, and that all of them were subject to the jurisdiction of the court wherein any of them were located.

§ 393. The right of appeal under amended act.—The provisions for appeal under the act of 1906, and the original act prior to the amendment of that year, are now superseded by the provisions of the act of 1910 relating to the commerce court, to which is given all the jurisdiction relating to cases brought to enjoin, to set aside, annul or suspend in whole or in part any order of the commission, which have been heretofore vested in the circuit court. Under this commerce act, all appeals are taken to the Supreme Court.

Suits for reparation in the United States circuit courts are conducted as other suits and are subject to the rights of appeal applicable in the federal circuits; and if brought in the state courts, to the law regulating appeal in the state courts.

§ 394. Jurisdiction of the courts in reviewing the orders of the commission.—Under the act as amended the only court having jurisdiction over the orders of the commission other than for the enforcement of claims for reparation or for the recovery of penalties will be the newly established commerce court. See § 391. The commerce court in its earliest decisions rendered soon after its organization has indicated the limitation of its jurisdiction in reviewing the orders of the commission. Thus in case No. 2, decided July 20, 1911, of the *Atchison Topeka & Santa Fe Railroad Co. et al., petitioners, v. the Interstate Commerce Commission* in determining the right of the railroads to make a charge for industrial track service in Los Angeles where it suspended

the order of the commission prohibiting such charge, the court said that the conclusion of the commission that the charge of violative of the commerce act was a conclusion of law and of course was open to inquiry in the commerce court. In the examination of the report of the commission the court was limited to the opinion of the majority of the commission, the views of the minority not being open to consideration. In this the court followed the view expressed by the supreme court in *Interstate Commerce Commission v. Del. L. & W. R. Co.*, 220 U. S. 235, 55 L. Ed. —, wherein the supreme court held that findings of fact made by the interstate commerce commission in a proceeding for redress for unlawful discrimination in railway rates were not open to review in the courts.

The commerce court also considered the same question of the limitation of its jurisdiction in a rate case (Case No. 5), of the *Receivers and Shippers Association of Cincinnati v. Interstate Commerce Commission*, decided July 20, 1911, wherein it affirmed the order of the commission as to rates from Cincinnati to Chattanooga. The court said that it had no power to fix rates and could not say that the elements to the commission took into consideration in fixing the schedule complained of were improper for the commission to consider, and therefore, could not conclude that the commission based a schedule of rates upon improper grounds.

The same view was expressed by the circuit judges of the fifth circuit in *L. & N. R. Co. v. Interstate Commerce Commission*, 184 Fed. 119, which was decided by that court in April, 1910, before the commerce court was extended so that the circuit court was then vested with the jurisdiction since transferred to the commerce court. The court said that in a suit to enjoin the enforcement of a rate it did not act as an appellate rate making commission, but its office was to see that the commission did not exceed its power and not to determine whether it erred in the exercise of it.

To the same effect see *M. K. & T. R. R. Co. v. Interstate Commerce Com.*, 164 Fed. 645 (1908), by the circuit judges of the eighth circuit. It was there held that the court would take into consideration evidence other than that before the commission, but the presumption was that the order of the commission was valid

and that the burden was upon the party attacking to make a clear case. See also the decisions of the supreme court construing the limits of the judicial power over the decisions of the commission, *supra*, § 52.

§ 395. The commerce court on the parties entitled to apply for review of commission's orders.—In *Proctor & Gamble Co. v. United States*, it was claimed that the commerce court had no jurisdiction over the complaint filed by the shipper which had been presented to the interstate commerce commission and disallowed, and then the proceeding had been filed in the circuit court seeking to set aside the order of the commission. This was a complaint against the exaction of demurrage on private cars, see *supra*, § 254. The jurisdiction of the court was denied on the ground that the petitioner was a shipper and the interstate commerce commission, having merely dismissed the complaint which was made to it and granted no affirmative relief, that there was nothing in the order of dismissal which it entered that afforded any basis for action, and that it was only the carrier against whom the order is made in favor of the shipper that can bring the case for review into the commerce court, and that the shipper was concluded by the action of the commission, whatever it might chance to be. But the court declined to entertain this view and said that the right of resort to the court extended to every one injuriously affected by the order of the commission. It was therefore held that the action of the commission, having the effect of an adverse decision with respect to the matter involved, even though negative in character, was an order which the court could enjoin or set aside. The petitioner, therefore, correctly came into the commerce court, as it could previously have gone into the circuit court of the United States, the requisite amount being involved and the case being one arising under the federal law, to have the action of the commission dismissing its complaint set aside and the demurrage charge disallowed, if that should be the conclusion reached with regard to it, either by direct decree, or by remanding the case to the commission with directions to sustain the complaint. The court therefore entertained the petition, and dismissed the case upon consideration of the merits.

§ 306. The finality of the orders of the commission.—It necessarily follows from this limitation of the power of judicial review, that the administrative orders of the commission in the exercise of this jurisdiction in determining the reasonableness of a railroad rate or regulation are final. In the words of the supreme court in the Coal Regulation Case, *supra*, “power to make the order and not the mere expediency or wisdom of having made it, is the question,” when brought into court.

In making such administrative orders the commission has necessarily a wide discretion and many factors may require consideration in any specific case. The conclusion may be the determination of a mixed question of law and fact. The announcement by the commission that a certain factor is controlling in the consideration of a rate or regulation would be a conclusion of law, which would be subject to judicial review, though the conclusion of the commission upon a reasonableness of the rate or regulation without any such conclusion of law as to any controlling factor would not be subject to review. This was illustrated in the decision of the supreme court in the So. Pacific Case, *supra*, § 174, that the fixing a rate for the encouragement of certain business interests was beyond the power of the commission. If the commission, however, had simply determined the reasonableness of the rate without recognizing any such controlling factor in the determination, its conclusion would not have been open to review. In this connection, it should be noted that there is no requirement in the Act of any statement by the commission of the reasons of its conclusions.

SECTION 16A.

§ 397. Section 16a.

§ 397. Section 16a.—SEC. 16a. (*Added June 29, 1906.*) That after a decision, order, or requirement has been made by the
[Commission may grant rehearings.]

Commission in any proceeding any party thereto may at any time make application for rehearing of the same, or any matter determined therein, and it shall be lawful for the Commission in its discretion to grant such a rehearing if sufficient reason therefor

[Application for rehearing shall not operate as stay of proceedings, unless so ordered by commission.]

be made to appear. Applications for rehearing shall be governed by such general rules as the Commission may establish. No such application shall excuse any carrier from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. In case a rehearing is granted the proceedings thereupon shall conform as nearly as may be to the proceedings in an original hearing, except as the Commission may otherwise direct; and if, in its judgment, after such rehearing and the consideration of all facts, including those arising since the former hearing, it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission may reverse, change, or

[Commission may, on rehearing, reverse, change, or modify order.]

modify the same accordingly. Any decision, order, or requirement made after such rehearing, reversing, changing, or modifying the original determination shall be subject to the same provisions as an original order.

It would seem that this section was needless, though it was recommended by the commission, as the right to review and to modify its own decisions probably existed under the very comprehensive grant of powers under the preceding sections.

SECTION 17.

§ 398. Interstate Commerce Commission—Form of procedure.

§ 398 (295). Interstate Commerce Commission—Form of procedure.—SEC. 17. (*As amended March 2, 1889.*) That the commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. A majority of the Commission shall constitute a quorum for the transaction of business, but no Commissioner shall participate in any hearing or proceeding in which he has any pecuniary interest. Said Commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, including forms of notices and the service thereof, which shall conform, as nearly as may be, to those in use in the courts of the United

[Parties may appear before the commission in person or by attorney.]

States. Any party may appear before said Commission and be heard in person or by attorney. Every vote and official act of Commission shall be entered of record, and its proceedings shall be public upon the request of either party interested. Said Com-

[Official seal.]

mission shall have an official seal, which shall be judicially noticed. Either of the members of the Commission may administer oaths and affirmations and sign subpoenas.

For rules of practice adopted by the Commission in the conduct of cases and proceedings under the Act, see appendix, p. 655, *infra*; and as to forms of procedure adopted by the Commission, see p. 665, *infra*. These rules and forms have been very liberally construed by the Commission. See *supra*, § 367.

SECTION 18.

§ 399. Salaries of commissioners, secretary, etc.

400. Expenses of the commission.

§ 399 (296). Salaries of commissioners, secretary, etc.—SEC. 18. (*As amended March 2, 1889.*) [*See Section 24, increasing*

[*Salaries of commissioners.*]

salaries of Commissioners.] That each Commissioner shall receive an annual salary of seven thousand five hundred dollars, payable in the same manner as the judges of the courts of the United States. The Commission shall appoint a secretary, who shall re-

[*Secretary—how appointed; salary.*]

ceive an annual salary of three thousand five hundred dollars,* payable in like manner. The Commission shall have authority

[*Employees.*]

to employ and fix the compensation of such other employees as it may find necessary to the proper performance of its duties. Until otherwise provided by law, the Commission may hire suitable

[*Offices and supplies.*]

offices for its use, and shall have authority to procure all necessary office supplies. Witnesses summoned before the Commis-

[*Witnesses' fees.*]

sion shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

[*Expenses of the commission—how paid.*]

All of the expenses of the Commission, including all necessary expenses for transportation incurred by the Commissioners, or by their employees under their orders, in making any investigation, or upon official business in any other places than in the city of Washington, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman of the Commission.

(This section is amended by section 24, *infra*, added by the amendatory act of June 29, 1906, increasing the number and salaries of the commission.)

§ 400 (297). Expenses of the commission.—The secretary of the Interstate Commerce Commission is entitled to be reimbursed for telegrams sent by him in pursuance of directions of the commission, approved by the chairman of the commission, and

* Increased to \$5,000 by sundry civil act of March 4, 1907, 34 Stat. L., 1811.

accompanied by the request of the chairman that the rules of the comptroller as to the production of copies of telegrams for which credit is asked be disregarded on account of the confidential character of the messages, the secretary having also offered to submit the books of the commission to the comptroller and auditing officers of the treasury. *United States v. Moseley*, 187 U. S. 322, 47 L. Ed. 198 (1902), affirming the judgment of the court of claims.

SECTION 19.

§ 401. Principal office of the commission, etc.

402. Practice of commission in hearings.

§ 401 (298). Principal office of the commission, etc.—Sec. 19.

That the principal office of the Commission shall be in the city of Washington, where its general sessions shall be held; but whenever the convenience of the public or the parties may be promoted, or delay or expense prevented thereby, the Commission

[Sessions of the commission.]

may hold special sessions in any part of the United States. It

[Commission may prosecute inquiries by one or more of

its members in any part of the United States.]

may, by one or more of the Commissioners, prosecute any inquiry necessary to its duties, in any part of the United States, into any matter or question of fact pertaining to the business of any common carrier subject to the provisions of this Act.

§ 402 (299). Practice of commission in hearing.—The commission has from its first organization followed the practice of directing cases involving local rates to be heard before one or more members of the Commission at a central point in the territory immediately affected by the rates.

SECTION 20.

§ 403. Section 20 as amended.

404. The amendments of 1906 and 1910.

405. Railroads not subject to section 20 of the act.

406. The enforcement of reports by mandamus.

407. The liability of the initial carrier.

408. The employment of special examiners.

409. The effectiveness of the publicity provisions of the section.

§ 403. Section 20 as amended.—Sec. 20. (*As amended June 29, 1906, February 25, 1909, and June 18, 1910.*) That the Com-

[Officers subject to act, and owners of railroads engaged in interstate commerce must render full annual reports to commission; and commission is authorized to prescribe manner in which reports shall be made and require specific answers to all questions.]

mission is hereby authorized to require annual reports from all common carriers subject to the provisions of this Act, and from the owners of all railroads engaged in interstate commerce as defined in this Act; to prescribe the manner in which such reports shall be made, and to require from such carriers specific answers to all questions upon which the Commission may need informa-

[What reports of carriers shall contain.]

tion. Such annual reports shall show in detail the amount of capital stock issued, the amounts paid therefor, and the manner of payment for the same; the dividends paid, the surplus fund, if any, and the numbers of stockholders; the funded and floating debts and the interest paid thereon; the cost and value of the carrier's property, franchises, and equipments; the number of employees and the salaries paid each class; the accidents to passengers, employees, and other persons, and the causes thereof; the amounts expended for improvements each year, how expended, and the character of such improvements; the earnings and receipts from each branch of business and from all sources; the operating and other expenses; the balances of profit and loss; and a complete exhibit of the financial operations of the carrier each year, including an annual balance sheet. Such reports shall

[Commission may prescribe uniform system of accounts and manner of keeping accounts.]

also contain such information in relation to rates or regulations concerning fares or freights, or agreements, arrangements, or contracts affecting the same as the Commission may require; and the Commission may, in its discretion, for the purpose of enabling it the better to carry out the purposes of this Act, prescribe a period of time within which all common carriers subject to the provisions of this Act shall have, as near as may be, a uniform

system of accounts, and the manner in which such accounts shall be kept.

[Annual reports to be filed with commission by September 30 of each year.]

Said detailed reports shall contain all the required statistics for the period of twelve months ending on the thirtieth day of June in each year, or on the thirty-first day of December in each year if the Commission by order substitute that period for the year ending June thirtieth, and shall be made out under oath and filed with the commission at its office in Washington within three months after the close of the year for which the report is made,

[Commission may grant additional time.]

unless additional time be granted in any case by the Commission; and if any carrier, person, or corporation subject to the provisions of this Act shall fail to make and file said annual reports within the time above specified, or within the time extended by the Commission, for making and filing the same, or shall fail to make specific answer to any question authorized by the provisions of this section within thirty days from the time it is lawfully required so to do, such party shall forfeit to the United

[Penalty.]

States the sum of one hundred dollars for each and every day it shall continue to be in default with respect thereto. The Commission shall also have authority by general or special orders to

[Monthly or periodical reports.]

require said carriers, or any of them, to file monthly reports of earnings and expenses, and to file periodical or special, or both periodical and special, reports concerning any matters about which the Commission is authorized or required by this or any other law to inquire or to keep itself informed or which it is required to enforce; and such periodical or special reports shall be under oath whenever the Commission so requires; and if any such carrier shall fail to make and file any such periodical or special report within the time fixed by the Commission, it shall be subject to the forfeitures last above provided.

[Recovery of forfeitures.]

Said forfeitures shall be recovered in the manner provided for the recovery of forfeitures under the provisions of this Act.

[Oath to annual reports, how taken.]

The oath required by this section may be taken before any person authorized to administer an oath by the laws of the State in which the same is taken.

[Commission may prescribe forms of accounts, records, and memoranda, and have access thereto.]

The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to the provisions of this Act, including the accounts, records, and memoranda of the movement of traffic as well as the receipts and expenditures of moneys. The Commission shall at

all times have access to all accounts, records, and memoranda kept by carriers subject to this Act, and it shall be unlawful for

[Carrier can not keep other accounts than those prescribed by commission.]

such carriers to keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, and it may employ special agents or examiners, who shall have authority

[Commission may employ special examiner to inspect accounts and records.]

under the order of the Commission to inspect and examine any and all accounts, records, and memoranda kept by such carriers. This provision shall apply to receivers of carriers and operating trustees.

[Punishment of carrier by forfeiture for failure to keep accounts or records as prescribed by commission or allow inspection of accounts or records.]

In case of failure or refusal on the part of any such carrier, receiver, or trustee to keep such accounts, records, and memoranda on books and in the manner prescribed by the Commission, or to submit such accounts, records, and memoranda as are kept to the inspection of the Commission or any of its authorized agents or examiners, such carrier, receiver, or trustee shall forfeit to the United States the sum of five hundred dollars for each such offense and for each and every day of the continuance of such offense, such forfeitures to be recoverable in the same manner as other forfeitures provided for in this Act.

[Punishment of person for false entry in accounts or records, or mutilation of accounts or records, or for keeping other accounts than those prescribed by commission. Fine or imprisonment or both.]

Any person who shall willfully make any false entry in the accounts of any book of accounts or in any record or memoranda kept by a carrier, or who shall willfully destroy, mutilate, alter, or by any other means or device falsify the record of any such account, record, or memoranda, or who shall willfully neglect or fail to make full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the carrier's business, or shall keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, shall be deemed guilty of a misdemeanor, and shall be subject, upon conviction in any court of the United States or competent jurisdiction, to a fine of not less than one thousand dollars nor more than five thousand dollars or imprisonment for a term not less than one year nor more than three years,

[Amendment of February 25, 1909.]

or both such fine and imprisonment: *Provided*, That the Commission may in its discretion issue orders specifying such operating, accounting, or financial papers, records, books, blanks, tickets, stubs, or documents of carriers which may, after a reason-

[When destruction of papers permissible.]

able time, be destroyed, and prescribing the length of time such books, papers, or documents shall be preserved.

[Punishment of special examiner who divulges facts or information without authority. Fine or imprisonment or both.]

Any examiner who divulges any fact or information which may come to his knowledge during the course of such examination, except in so far as he may be directed by the Commission or by a court or judge thereof, shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not more than five thousand dollars or imprisonment for a term not exceeding two years, or both.

[United States courts may issue mandamus to compel compliance with provisions of act.]

That the circuit and district courts of the United States shall have jurisdiction, upon the application of the Attorney-General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of said Act to regulate commerce or of any Act supplementary thereto or amendatory thereof by any common carrier, to issue a writ or writs of mandamus commanding such common carrier to comply with the provisions of said Acts, or any of them.

[Commission may employ special agents or examiners to administer oaths, examine witnesses, and receive evidence.]

And to carry out and give effect to the provisions of said Acts, or any of them, the Commission is hereby authorized to employ special agents or examiners who shall have power to administer oaths, examine witnesses, and receive evidence.

[Receiving common carrier liable for loss or damage on through shipments carried by it or by any connection, irrespective of contract to contrary.]

That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation

[Remedies under existing law not barred.]

company from the liability hereby imposed. *Provided:* That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

[Initial carrier may have recourse upon carrier responsible for loss or damage.]

That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to

recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof.

§ 404. The amendments of 1906 and 1910.—This section has been extensively amended. Thus by the act of 1906 the provision for the annual reports was made more specific, and also the reports of accidents, and detailed regulation of the forms of accounts, records, memoranda of the carriers, and the prohibition of any other records or memoranda than those prescribed by the rules of the commission; the power of inspection, and penalties to enforce this right of inspection, and punishment for false entries, and mandamus to compel compliance with the provisions of the act, with the employment of special agents and examiners, and the provision as to the liability of the initial carriers, were all added in this amendment of 1906.

In 1910 was added the provision for filing of reports at the end of the calendar year, if so ordered by the commission; the requirement of filing monthly or special reports was made more specific, and provision was also enacted for authorizing the destruction of books and papers of the carriers after a reasonable time.

§ 405. Railroads not subject to section 20 of the act.—A railroad which is not subject to the provisions of the Interstate Commerce Act is not bound to make any report of its business to the Interstate Commerce Commission under this section. Thus a railroad located wholly within a state, which transports freight, whether coming from within or without the state, solely on local bills of lading, under a special contract limited to its own lines, and without dividing charges with any other carriers, or assuming any other obligations to or for it, is not bound to make any report of its business to the Interstate Commerce Commission. *United States ex rel. v. K. & S. R. Co.*, 81 Fed. 783 (1897), W. Dist. of Mich. See also *Commission v. Belaire C. & Z. R. Co.*, 77 Fed. 942 (1897). But where a carrier operates a railroad wholly within a state, but is engaged in interstate transportation by agreements for through traffic, it is required under the act to report to the commission as to the interstate commerce. *Commission v. Seaboard Ry. Co.*, 82 Fed. 563 (1897).

§ 406. The enforcement of reports by mandamus.—Prior to the amendatory act of 1906, it had been held by the supreme court in a suit brought by the commission against the Lake Shore and Michigan Southern Railroad Company, that the circuit court had no jurisdiction under the section before the amendment of 1906 to enforce reports by writ of mandamus, as such power to issue original writs of mandamus only existed in the circuit courts when specifically conferred by statute. Under the act as amended the right to issue mandamus to compel a compliance with any of the provisions of the act is conferred upon the circuit courts and district courts, upon application of the attorney-general at the request of the commission.

§ 407. The liability of the initial carrier.—The so-called Carmack amendment, imposing upon the initial carrier the liability for loss or damage on through shipments with a remedy over, was inserted in 1906 in this section and has been sustained by the supreme court as the rightful exercise of the power of congress under the commerce clause. *Atlantic C. L. R. Co. v. Riverside Mills*, 219 U. S. p. 186, 55 L. Ed. p. — (January 3, 1911). In this case the court affirmed the circuit court of the southern district of Georgia, in holding the initial carrier in an interstate shipment liable to the shipper for a loss while the goods were in charge of connecting carriers, and although the bill of lading provided no carrier should be liable for loss or damage not occurring on its portion of the route. The court said the liability of the receiving carrier in such a case was that of a principal for the negligence of its own agent. It held, however, that the attorney's fee, taxable as a part of the costs under sec. 8 of the act, was not collectible in this case under this Carmack amendment, since the cause of action was the loss of property which was in no way traceable to the violation of the provision of the statute.

The court in this case assumed that the through routing was under a voluntary arrangement made by the carrier wherewith the defendant had made its own arrangements and division of rate; and the court said that was the presumption in the absence of anything in the record to show a different arrangement. The court, therefore, did not pass upon the question whether the liability would exist if the through routing was compulsory, that is, forced upon the carrier by the commission under sec. 15 of the

act. It would seem at least doubtful whether this initial liability could be enforced in such a case. As to the effect of the enactment upon state legislation enacted during the non-action of congress, see § 35, *supra*. This is the first legislation by congress in the exercise of its power in interstate and foreign commerce over bills of lading other than maritime traffic.

See also opinion of Rogers, J., in *Smelzer v. St. L. & St. F. R. Co.*, 158 Fed. 649, C. C. W. D. Ark. in 1908, sustaining this provision.

§ 408. The employment of special examiners.—This provision for the employment of special examiners, with power to summon witnesses and receive evidence, which was first enacted in 1906, adds very materially to the effectiveness of the act, in that it relieves the members of the commission from the necessity theretofore imposed of attendance in different parts of the country in taking testimony.

§ 409. The effectiveness of the publicity provisions of the section.—The enactment of this section prescribing the form of accounts and records kept by the carrier, with the right of inspection, was strongly urged by the commission in its report for the year 1905, page 11, where it said that probably no one thing would go further toward the detection of rebates and kindred wrong-doing. The provision of the section for a uniform system of accounts for railroads and other common carriers, for a board of examiners of accounts, and for annual, monthly or special reports, has been found most effective for the end of preventing illegal practices and of procuring the desired publicity in railway operations. The commission has organized a bureau of statistics and accounts, which has co-operated with the state railway commissioners, and also with the carriers, in making a uniform system of railway accounting. The commission in its report for 1910 has urged upon congress the bringing of all water line carriers doing an interstate business under its jurisdiction, so far, at least, as the twentieth section of the act is concerned.

By the act of 1910, telegraph and telephone companies doing an interstate business are placed under the jurisdiction of the commission. The commission in its report for 1910, says that steps have been taken for the formulation of a system for operating and accounting for these companies, and it is expected

that the system will become effective on July 1, 1911. With regard to telephone companies, the commission says that there are from twenty-five to thirty thousand telephone companies which make provision for interstate communication, and the commission is in doubt whether it was the intent of congress to place all of these companies under its supervision and control.

SECTION 21.

§ 410. Section 21 as amended.

411. The annual reports of the commission.

[Annual reports of the commission to congress.]

§ 410. Section 21 as amended.—SEC. 21. (*As amended March 2, 1889.*) That the Commission shall on or before the first day of December in each year, make a report, which shall be transmitted to Congress, and copies of which shall be distributed as are the other reports transmitted to Congress. This report shall contain such information and data collected by the Commission as may be considered of value in the determination of questions connected with the regulation of commerce, together with such recommendations, as to additional legislation relating thereto as the Commission may deem necessary; and the names and compensation of the persons employed by said Commission.

§ 411. The annual reports of the commission.—The annual reports of the commission published by the Government Printing Office have been regularly issued since the organization of the commission and are now (1911) 24 in number. The reports contain a discussion of the work of the commission during the year with recommendations for further legislation; a full report of decisions during the year and of pending litigation both civil and criminal in the enforcement of the act to regulate commerce. A statement of the clerical force and other employes of the commission several hundred in number at an annual expense of \$1,385,000 during the past year 1910 is also included. The reports contain a digest of reported cases during the year, a digest of the court decisions relative to the commission and to the enforcements of the act, and also of cases in Interstate Commerce relative to matters arising before the commission. The vast range of the duties of the commission, and their great expansion under the successive acts of congress are indicated in these annual reports.

SECTION 22.

§ 412. Persons and property that may be carried free or at reduced rates, etc.

413. Amendments to section.

414. The section illustrative and not exclusive.

415. The section permissive only.

416. Withdrawal of commutation tickets.

417. The commission on excursion rates.

418. The jurisdiction of the commission as to commutation rates.

§ 412. Persons and property that may be carried free or at reduced rates, etc.—SEC. 22. (*As amended March 2, 1889, and February 8, 1895.*) [*See section 1, 4th par.*] That nothing in this act shall prevent the carriage, storage, or handling of property free or at provided rates for the United States, State, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the free carriage of destitute and homeless persons transported by charitable so-

[*Mileage, excursion, or commutation passenger tickets.*]

cieties, and the necessary agents employed in such transportation, or the issuance of mileage, excursion, or commutation passenger tickets; nothing in this Act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Orphan Homes, including those about to enter and those

[*Passes and free transportation to officers and employees of railroad companies.*]

returning home after discharge, under arrangements with the boards of managers of said homes; nothing in this Act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad

[*Provisions of act are in addition to remedies existing at common law. Pending litigation not affected by act.*]

companies for their officers and employees; and nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies: *Provided*, That no pending litigation shall in any way be affected by this Act: *Provided further*, That nothing in this Act shall prevent the issuance of joint interchangeable five-thousand-mile tickets, with special

[Joint interchangeable five-thousand-mile tickets. Amount of free baggage.]

privileges as to the amount of free baggage that may be carried under mileage tickets of one thousand or more miles. But before any common carrier, subject to the provision of this Act, shall issue any such joint interchangeable mileage tickets with special privileges, as aforesaid, it shall file with the Interstate Commerce Commission copies of the joint tariffs of rates, fares, or charges on which such joint interchangeable mileage tickets are to be based, together with specifications of the amount of free baggage permitted to be carried under such tickets, in the same manner as common carriers are required to do with regard to other joint

[Publication of rates.]

rates by section six of this Act; and all the provisions of the said section six relating to joint rates, fares, and charges shall be observed by said common carriers and enforced by the Interstate Commerce Commission as fully with regard to such joint interchangeable mileage tickets as with regard to other joint rates, fares, and charges referred to in said section six. It shall be unlawful for any common carrier that has issued or authorized to

[Sale of tickets.]

be issued any such joint interchangeable mileage tickets to demand, collect, or receive from any person or persons a greater or less compensation for transportation of persons or baggage under such joint interchangeable mileage tickets than that required by

[Penalties.]

the rate, fare, or charge specified in the copies of the joint tariff of rates, fares, or charges filed with the Commission in force at the time. The provisions of section ten of this Act shall apply to any violation of the requirements of this proviso.

§ 413 (304). Amendments to section.—The amendment of March 2, 1889, incorporated in the Act to Regulate Commerce, a provision as follows:

“Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law, or by statute, but the provisions of this act are in addition to such remedies.”

Notwithstanding the collocation of this provision in the twenty-second section, it clearly is to be construed with all of these sections, and relates to all the remedies provided by the act and has been so construed by the courts. See section 8 of act, *supra*.

The amendment of 1895 incorporated a second proviso concerning the issuance of joint interchangeable five thousand mile tickets.

This section in its regulation of passes and free transportation,

must be construed with the very comprehensive regulation of the same subject in section 1, see *supra*.

§ 414 (305). **The section illustrative and not exclusive.**—This section was construed in the Party Rate Case, § 201 (*supra*), where the court said, that the provision that the discriminations in favor of certain persons therein named shall not be deemed unjust, did not forbid discriminations in favor of others under circumstances and conditions so substantially alike as to justify the same treatment. The object of section 22 was to settle beyond all doubt that discriminations in favor of certain persons therein named should not be deemed unjust, and the section was rather illustrative than exclusive. The court said that many, if not all, of the excepted classes named in section 22, are those which in the absence of the section would not necessarily be held the subjects of an unjust discrimination, if more favorable terms were extended to them than to ordinary passengers.

In *Ex parte Koehler*, 31 Fed. 315 (1887), it was ruled by the circuit court under this section, that the exception allowed for the issuance of passes in favor of officers and employees, did not include the families of such persons, such preferences being forbidden by section 2 of the act.

In *U. S. v. Chicago & N. W. Ry.*, 127 Fed. 785 (1904), it was ruled by the circuit court of appeals of the seventh circuit, that the government of the United States in buying transportation of a railroad for its soldiers in lots of ten or more, was not entitled to the benefit of the reduced ten party rate given by the company's schedule to theatrical, operatic or concert companies, hunting and fishing parties, glee clubs, brass or string bands and other parties of like character. The court said that the refusal to give the same rates did not constitute an unjust discrimination. These rates were for tickets closely limited in time and paid for in cash in advance, while those furnished the government were furnished on requisitions and paid after a delayed auditing; that the tickets of other classes increased the company's business, while the carrying of soldiers for the government did not. So that the conditions were essentially different under section 2.

In *American Express Company v. United States*, *supra*, § 138, the supreme court affirmed the judgment of the circuit court,

northern district of Illinois, in enjoining the express companies from giving free transportation of personal packages to the officers, employes and members of their families, and to officers of other companies and to members of their families, in exchange for passes issued by the latter to the officers of the express companies, affirming 161 Fed. Rep. 606. That although express companies were termed common carriers, they were not included in the proviso of section 1 as amended in 1906.

§ 415 (306). The section permissive only.—This section is permissive only and imposes no restriction upon the carrier as to the issuance of such tickets. Congress intended by this provision to leave the issuance of such tickets free from restriction. There is no discrimination therefore in issuing them on one occasion and not issuing them on another. 6 I. C. C. R. 113. When they are issued however whatever the occasion, they must be offered impartially to all who accept the conditions on which they are issued, and the rates at which they are sold must be published. The general requirements of the act to regulate commerce are as applicable to these classes of tickets as to any others. 2 I. C. C. R. 649, 2 Int. Com. Rep. 340. In the latter case the commission recommended the amendment of the act so as to define what should be considered excursion and commutation tickets and restrict their issue in interstate commerce so as to prevent the abuses pointed out in the opinion.

§ 416 (307). Withdrawal of commutation tickets.—Under this section carriers are allowed to issue mileage and commutation as well as excursion tickets, but they cannot be compelled to do so. As it is their discretion when they shall issue such tickets, it is equally within their discretion when to withdraw them. It was suggested in 8 I. C. C. R. 443, whether the allowance of commutation rates at stations on one line of a railroad system and the denial of such rates on another line of the same system, such stations being respectively of the same character, would be an undue preference or not, but the question was not involved in the case for decision. The commission in this case cited the opinion of the supreme court in *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 684, 43 L. Ed. 858 (1899), where the supreme court held that the power of the legislature to enact general laws regarding the company and its affairs did not include the

power to compel it to make an exception in favor of some particular class or community and to carry the members of that class at a less sum than it has the right to charge those who were not fortunate enough to be members thereof. The commission said in this case that commutation tickets are extensively used and have become a recognized feature of suburban transportation, and that they were far from saying that a carrier who has established commutation rates for suburban service, especially when residences have been fixed and business interests adjusted in reliance upon their continuance, could suddenly or otherwise withdraw those rates and exact from its patrons the full rates charged to the occasional traveler. It was ruled in the case however that the action of the railroads in withdrawing the 180-trip quarterly tickets between Baltimore and Washington was within the limits of their discretion and did not constitute a violation of the act.

As to thousand mile tickets, see 1 I. C. C. R. 156, 1 Int. Com. Rep. 393. As to mileage tickets, see 1 I. C. C. R. 147, 1 Int. Com. Rep. 369.

Indian Supplies.—When under the statute the Government contracts for the delivery of the supplies needed for the Indian service, at New York and other points designated, and then advertises for bids for the transportation of the supplies from the points of delivery to the points where they are to be made use of, this transportation at the cost of the government is “for the United States” within the meaning of section 22 of the act to regulate commerce, and is not required to be made at the regular published rates. See I. C. C. R. 15, 1 Int. Com. Rep. 22.

§ 417. The commission on excursion rates.—In 17 I. C. C. R. 212, the commission discussed the subject of excursion rates in a case wherein the citizens of Ogden complained that the semi-annual excursion rates of the Oregon Short Line Railroad Company discriminated in favor of Salt Lake City and against Ogden. The railroad contended that excursion rates were entirely exempted from the operation of the act regulating commerce or, at least, as to the provisions relating to discrimination. The commission says that the inference from the decisions was that the carrier could determine for itself whether it would sell commutation, mileage, or excursion tickets, but that if it elected to sell them it must do so subject to the provisions of the act. It was not prepared to admit that under no circumstances could the

commission inquire whether undue discrimination had arisen from the issuance of such statements; but as the statute authorized discrimination in the issuance of the tickets the commission would only be justified in interfering where the privilege was plainly abused. The commission suggested that the railroad company should make a uniform passenger rate at one and one-half cents per mile each way to all state and county fairs, and not limit them to the Mormon conference gathering; but it said that that was a matter upon which it had no authority to make any requirement.

§ 418. The jurisdiction of the commission as to commutation rates.—In a recent hearing before the commission known as the Commutation Rate case, 21 I. C. C. R. 428, decided June 21, 1911. it was claimed that the commission had no jurisdiction over commutation fares. It seems that this section as originally enacted contained the provision, "That nothing in this act shall apply to * * * the issuance of mileage, excursion or commutation passenger tickets." This was amended in March, 1889 so as to read. "That nothing in the act shall prevent, etc., * * * the issuance of mileage, excursion or commutation tickets." The commission came to the conclusion that reading section 22 in the light of the special nature and character of commutation traffic and service, the utmost that reasonably may be said of it, as applied to commutation tickets is that it constitutes a statutory recognition of the fact that commutation is a different kind of traffic, and, therefore, is not to be compared with any other kind of passenger traffic. The commission calls attention to the fact that commuters in many cases make their homes separate from their places of business in reliance upon the commutation services. The carriage of a commuter, therefore, differs in many respects from other passenger traffic and is an independent and a special service and a special kind of traffic. The commission, therefore came to the conclusion that they had the right to examine into the reasonableness of commutation services under section 1. See *supra*, § 181.

SECTION 23.

§ 419. Jurisdiction of United States courts to issue writs of mandamus.

420. Application of section to car shortage.

421. Commission to consist of seven members; terms; salaries.

[Jurisdiction of United States courts to issue writs of peremptory mandamus commanding the movement of interstate traffic or the furnishing of cars or other transportation facilities.]

§ 419 (308). Jurisdiction of United States courts to issue writs of mandamus.—SEC. 23. (*Added March 2, 1889.*) That the circuit and district courts of the United States shall have jurisdiction upon the relation of any person or persons, firm, or corporation, alleging such violation by a common carrier, of any of the provisions of the Act to which this is a supplement and all Acts amendatory thereof, as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or upon terms or conditions as favorable as those given by said common carrier for like traffic under similar conditions to any other shipper, to issue a writ or writs of mandamus against said common carrier, commanding such common carrier to move and transport the traffic, or to furnish cars or other facilities for transportation for the party applying for the writ:

[Peremptory mandamus may issue, notwithstanding proper compensation of carrier may be undetermined.]

Provided, That if any question of fact as to the proper compensation to the common carrier for the service to be enforced by the writ is raised by the pleadings, the writ of peremptory mandamus may issue notwithstanding such question of fact is undetermined, upon such terms as to security, payment of money into the court, or otherwise, as the court may think proper, pending

[Remedy cumulative, and shall not interfere with other remedies provided by the act.]

the determination of the question of fact: *Provided*, That the remedy hereby given by writ of mandamus shall be cumulative, and shall not be held to exclude or interfere with other remedies provided by this Act or the Act to which it is a supplement.

§ 420 (309). Application of section to car shortage.—This section was not a part of the original act, but was first enacted in the amendatory act of March 2, 1889. It deals wholly with the remedial process of mandamus. The remedy was unsuccessfully invoked in a number of cases in the courts in which an effort was made to enforce through routing; see “Interchange of Facilities,” *supra*, § 278. The difficulty in these cases was not

in the remedy, but with the right. The section, however, was successfully invoked in a case involving alleged discrimination in the supply of cars, see *United States v. Norfolk & Western R. Co.*, 109 Fed. 831; *United States v. West Virginia & N. R. Co.*, 105 Fed. 252; *United States v. Del. & W. R. Co.*, 40 Fed. 101. See *supra*, "Unjust preference in car service," § 250. See also *West Virginia v. R. Co.*, 134 Fed. 198, C. C. A. fourth circuit, and affirming 125 Fed. 252. In this case, the court held that the circuit court had the power in a proceeding of this character to fix the percentage of cars the relator should have in times of shortage.

See also same court in *U. S. ex rel. v. Norfolk & Western R. R. Co.*, 143 Fed. 266 (1906), reversing 138 Fed. 849, and in *Merchants Coal Co. v. Fairmont Coal Co.*, 169 Fed. 769 (1908).

In *B. & O. R. Co. v. United States ex rel.*, 215 U. S. 481, 54 L. Ed. 292, in 1909, the supreme court, in reversing the circuit court of appeals to the fourth circuit, 165 Fed. Rep. 113, which had awarded mandamus to compel equitable distribution, held that mandamus was no longer the proper remedy, though the statute had been specifically enacted for that purpose, in view of the very comprehensive amendments to the act enlarging the powers of the Interstate Commerce Commission, and that one of the purposes of these amendments was to cure the presumed remedial inefficiency of the act, to supply efficient means for giving effect to the orders of the commission. The alleged discriminating practices in the distribution of cars in times of shortage, was within the peculiar jurisdiction of the commission for investigation. The proper procedure, therefore, was to make complaint to and demand investigation through the commission. This decision overruled several decisions in the court of appeals, and circuit courts taking a contrary view.

§ 421. Commission to consist of seven members; terms; salaries.—SEC. 24. (*Added June 29, 1906.*) That the Interstate Commerce Commission is hereby enlarged so as to consist of seven members with terms of seven years, and each shall receive

[Qualifications and enlargement of commission.]

ten thousand dollars compensation annually. The qualifications of the Commissioners and the manner of the payment of their salaries shall be as already provided by law. Such enlargement of the Commission shall be accomplished through appointment by the President, by and with the advice and consent of the Senate,

of two additional Interstate Commerce Commissioners, one for a term expiring December thirty-first, nineteen hundred and eleven, one for a term expiring December thirty-first, nineteen hundred and twelve. The terms of the present Commissioners, or of any successor appointed to fill a vacancy caused by the death or resignation of any of the present Commissioners, shall expire as heretofore provided by law. Their successors and the successors of the additional Commissioners herein provided for shall be appointed for the full term of seven years, except that any person appointed to fill a vacancy shall be appointed only for the unexpired term of the Commissioner whom he shall succeed. Not more than four Commissioners shall be appointed from the same political party.

[Existing laws as to attendance of witnesses and production of evidence applicable in proceedings under this act.]

(Additional provisions in Act of June 29, 1906.) (Sec. 9.) That all existing laws relating to the attendance of witnesses and the production of evidence and the compelling of testimony under the Act to regulate commerce and all Acts amendatory thereof shall apply to any and all proceedings and hearings under this Act.

[Conflicting laws repealed.]

(Sec. 10.) That all laws and parts of laws in conflict with **[Amendments not to affect pending causes in court.]** the provisions of this Act are hereby repealed; but the amendments herein provided for shall not affect causes now pending in courts of the United States, but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law.

[When act effective.]

(Sec. 11.) That this Act shall take effect and be in force from and after its passage.

[Time of taking effect extended 60 days (August 23, 1906).]

Joint resolution of June 30, 1906, provides: "That the Act entitled 'An Act to amend an Act entitled "An Act to regulate commerce," approved February 4, 1887, and all Acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission,' shall take effect and be in force sixty days after its approval by the President of the United States."

[When act effective.]

(Sec. 18 of Act of June 18, 1910.) That this act shall take effect and be in force from and after the expiration of sixty days after its passage, except as to sections twelve [sec. 15 of Act to regulate commerce, p. 23 herein] and sixteen [sec. 16 of Commerce Court Act, p. 47 herein], which sections shall take effect and be in force immediately.

THE ELKINS' ACT.

§ 422. The Elkins Act as amended.

423. The enactment and amendments to the act.

424. The repealing clause of the Hepburn Act did not bar prior offenses.

425. The validity and enforcibility of the act.

426. Participation in the joint rate.

427. The unit of offenses under the act. The Standard Oil Company of Indiana case.

428. Prior contracts and want of criminal intent no defenses.

429. Conspiracy in rebating.

430. What are rebates.

431. Requisites of indictment under the act.

§ 422. The Elkins Act as amended.

AN ACT To further regulate commerce with foreign nations and among the States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, Sec. 1. (As

[Carrier corporation as well as officer or agent liable to conviction for misdemeanor.]

amended June 29, 1906.) That anything done or omitted to be done by a corporation common carrier, subject to the Act to regulate commerce and the Acts amendatory thereof, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said Acts or under this Act, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it

[Penalty.]

shall be subject to like penalties as are prescribed in said Acts or by this Act with reference to such persons, except as such penalties are herein charged. The willfull failure

[Failure of carrier to publish rates or observe tariffs a misdemeanor.]

upon the part of the carrier subject to said Acts to file and publish the tariffs or rates and charges as required by said Acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof

[Penalty, fine.]

the corporation offending shall be subject to a fine of not less than one thousand dollars nor more than twenty thousand dollars for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept

[Misdemeanor to offer, grant, give, solicit, accept, or receive any rebate from published rates or other concession or discrimination.]

or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misde-

[Penalty, fine or imprisonment, or both.]

meanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars: *Provided*, That any person, or any officer or director of any corporation subject to the provisions of this Act, or the Act to regulate commerce and the Acts amendatory thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court. Every violation of this section shall be prosecuted

[Judicial district in which cases may be prosecuted.]

in any court of the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein.

[Act of officer or agent to be also deemed act of carrier.]

In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, or shipper, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or shipper as well as that of the person. Whenever any carrier

[Rates filed or participated in by carrier shall, as against such carrier, be deemed legal rate.]

files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the Act to regulate commerce or Acts amendatory thereof, or participates in any rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under this Act shall be con-

clusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this Act.

Any person, corporation, or company who shall deliver property for interstate transportation to any common carrier, subject to the provisions of this Act, or for whom as consignor or consignee, any such carrier shall transport property from one State, Territory, or the District of Columbia to any other State, Territory, or the District of Columbia, or foreign country, who shall knowingly by employee, agent, officer, or otherwise, directly, or indirectly, by or through any means or device whatsoever, receive or accept from such common carrier any sum of money or any other valuable consideration as a rebate or offset

[Forfeiture, in addition to other prescribed penalty, of three times amount of money and value of consideration illegally received shall be paid to the United States.]

against the regular charges for transportation of such property, as fixed by the schedules of rates provided for in this Act, shall in addition to any penalty provided by this Act forfeit to the United States a sum of money three times the amount of money so received or accepted and three times the value of any other consideration so received or accepted, to be ascertained by the

[Attorney-general to collect such forfeiture by civil action.]

trial court; and the Attorney-General of the United States is authorized and directed, whenever he has reasonable grounds to believe that any such person, corporation, or company has knowingly received or accepted from any such common carrier any sum of money or other valuable consideration as a rebate or offset as aforesaid, to institute in any court of the United States of competent jurisdiction a civil action to collect the said sum or sums so forfeited as aforesaid; and in the trial of said action all such rebates or other considerations so received or accepted

[Period covered to be six years prior to commencement of action.]

for a period of six years prior to the commencement of the action may be included therein, and the amount recovered shall be three times the total amount of money, or three times the total value of such consideration, so received or accepted, or both, as the case may be.

[Persons interested in matters involved in cases before Interstate Commerce Commission or circuit court may be made parties and shall be subject to orders or decrees.]

Sec. 2. That in any proceeding for the enforcement of the provisions of the statutes relating to interstate commerce, whether such proceedings be instituted before the Interstate Commerce Commission or be begun originally in any circuit court of the United States, it shall be lawful to include as par-

ties, in addition to the carrier, all persons interested in or affected by the rate, regulation, or practice under consideration, and inquiries, investigations, orders, and decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers.

[Proceedings to enjoin or restrain departures from published rates or any discrimination prohibited by law against carriers and parties interested in traffic.]

Sec. 3. That whenever the Interstate Commerce Commission shall have reasonable ground for belief that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, or is committing any discriminations forbidden by law, a petition may be presented alleging such facts to the circuit court of the United States sitting in equity having jurisdiction; and when the act complained of is alleged to have been committed or as being committed in part in more than one judicial district or State, it may be dealt with, inquired of, tried, and determined in either such judicial district or State, whereupon it shall be the duty of the court summarily to inquire into the circumstances, upon such notice and in such manner as the court shall direct and without the formal pleadings and proceedings applicable to ordinary suits in equity, and to make such other persons or corporations parties thereto as the court may deem necessary, and upon being satisfied of the truth of the allegations of said petition said court shall enforce an observance of the published tariffs or direct and require a discontinuance of such discrimination by proper orders, writs, and process, which said orders, writs, and process may be enforceable as well against the parties interested in the traffic as against the carrier, subject to the right of appeal as now provided by law. It shall be

[Such proceedings shall not prevent actions for recovery of damages or other action authorized by act to regulate commerce or amendments thereof.]

the duty of the several district attorneys of the United States, whenever the Attorney-General shall direct, either of his own motion or upon the request of the Interstate Commerce Commission, to institute and prosecute such proceedings, and the proceedings provided for by this Act shall not preclude the bringing of suit for the recovery of damages by any party injured, or any other action provided by said Act approved February fourth, eighteen hundred and eighty-seven, entitled "An Act to regulate commerce" and the Acts amendatory thereof.

[Compulsory attendance and testimony of witnesses and production of books and papers.]

And in the proceedings under this Act and the Acts to regulate commerce the said courts shall have the power to compel the

attendance of witnesses, both upon the part of the carrier and the shipper, who shall be required to answer on all subjects relating directly or indirectly to the matter in controversy, and to compel the production of all books and papers, both of the carrier and the shipper, which relate directly or indirectly to

[Immunity to testify witnesses.]

such transaction; the claim that such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such person from testifying or such corporation producing its books and papers, but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in such proceed-

[Expediting Act of Feb. 11, 1903, to apply in cases prosecuted under direction of attorney-general in name of Interstate Commerce Commission.]

ing: *Provided*, That the provisions of an Act entitled "An Act to expedite the hearing and determination of suits in equity pending or hereafter brought under the Act of July second, eighteen hundred and ninety, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, or any other acts having a like purpose that may be hereafter enacted, approved February eleventh, nineteen hundred and three," shall apply to any case prosecuted under the direction of the Attorney-General in the name of the Interstate Commerce Commission.

[Conflicting laws repealed.]

Sec. 4. That all Acts and parts of Acts in conflict with the provisions of this Act are hereby repealed, but such repeal shall not affect causes now pending, nor rights which have already accrued, but such causes shall be prosecuted to a conclusion and such rights enforced in a manner heretofore provided by law and as modified by the provisions of this Act.

§ 423. The enactment and amendments to the act.—This act, approved February 19, 1903, and known as the Elkins Act, made a very substantial amendment to the penal provisions of section 10, as well as to sections 6 and 2 of the act. *First*, in abolition of the penalty of imprisonment, which however, was restored by the amendment of the Hepburn Act of 1906. *Second*, in making the railroad corporation itself liable to prosecution in all cases where the officers or agents were liable under original act, the officers and agents continuing to be liable as theretofore; *third*, in making the published tariff the standard of lawfulness and any departure therefrom declared to be a

misdemeanor; *fourth*, the jurisdiction of prosecutions of offenses under this act is given to any court of the United States having jurisdiction of crimes within the district within which the violation was committed, or through which the transportation may have been conducted; and *fifth*, in construing and enforcing the provisions of the act, the violation thereof by any person acting for or in the employ of any carrier, acting within the scope of his employment, is in every instance to be deemed the act and offense of such carrier.

Under the Hepburn act of 1906, this section was amended so as to restore the penalty of imprisonment; so now the penalties of both fine and imprisonment are imposed on both carrier and shipper and a penalty of a three-fold forfeiture of the amount of rebate is superadded to the carrier, these changes made by the act of 1906 being shown in the bracket insertions.

It was held in *Illinois v. Terminal R. Co.* (Dist. Ct. of Illinois, 1909), 168 Fed. 546, that under this Elkins Act the penalty for failure on the part of any carrier of not publishing and filing its rates is as severe as the penalty for not strictly observing such rates after filing, and the defendant though operating a terminal railroad entirely within the state was held subject to the act, as it was engaged in interstate commerce and was convicted of moving cars in interstate commerce where it had not filed its rates covering such services.

§ 424. The repealing clause of the Hepburn Act did not bar prior offenses.—The general repealing clause of the act of 1906, “repealing all acts and parts of acts in conflict therewith,” did not release any penalty under the then existing statute. *Great Northern R. R. Co. v. United States*, 208 U. S. 452, 52 L. Ed. 567 (1908), affirming 155 Fed. 945, and 151 Fed. 84. See also *United States v. N. Y. C. & H. R. R. Co.*, 13 Fed. 630 (W. D. of N. Y.) and an indictment alleging that the carrier unlawfully and willfully gave rebates, following the language of the original Elkins Act, was sufficient, though under the Hepburn Act it was necessary to allege that the rebates were “given knowingly.” *United States v. D. L. & W. R. R. Co.* (C. C. A. second district), 152 Fed. 269 (1907).

The payment of a rebate after the passage of the Elkins Act, paid upon shipments of property transported prior to that enactment is covered by the act. *N. Y. C. & H. R. R. Co. v.*

United States, 212 U. S. 500, 53 L. Ed. 624 (1909), affirming 146 Fed. 298.

§ 425. The validity and enforceability of the act.—The sixth amendment to the constitution is not violated by the provision of the act whereunder the offense of obtaining an interstate transportation of goods at less than the carrier's published rate may be tried in any Federal District through which the transportation was conducted. *Armour Packing Co. v. United States*, 209 U. S. 56, 52 L. Ed. 681 (1908), affirming 153 Fed. 1. The taking of a rebate is a continuing crime which may run through several jurisdictions. In this case the carrier obtained a through bill of lading from Kansas City to Christiana, Norway. The offense was held properly prosecuted in the western district of Missouri through the actual shipment and contract was made in Kansas City, Kansas.

Neither is due process of law violated by the provision of the act whereunder the commission by corporate officers acting within the scope of their employment of criminal violation of the act is imputed to the corporation, the court saying that if the position invalidated such a provision as to individual carriers, if there were such, it did not affect the validity of the act as to corporate carriers, and that both the corporation and its agents may be joined in one indictment. *N. Y. C. & H. R. R. Co. v. United States*, 212 U. S. 481, 53 L. Ed. 613 (1908), affirming 146 Fed. 298. And in the *Armour Packing* case it was also held that it was immaterial that the shipment was under a through bill of lading to a foreign port, and that the act was not violative of the Constitution forbidding the levying of export taxes, nor did it give preference to the ports of one State over another.

§ 426. Participation in a joint rate.—A carrier is bound by a published rate in which it participates, though it was filed by the initial carrier. The supreme court said that this distinction was immaterial in view of the concluding part of sec. 1, which was evidently enacted with the view to meet the various situations developed wherein a joint rate was established binding up all who are parties and filed by one of the participating carriers. *U. S. v. N. Y. C. & H. R. R. Co.*, 212 U. S. 509, 53 L. Ed. 629 (1909), reversing 157 Fed. 209; *U. S. v. N. Y. C. & H. R. R. Co.*, 212 U. S. 509, reversing 157 Fed. 293.

Where there is no joint rate over the connecting lines published and filed; the lawful rate to charge is the sum of the local rates; and where there are joint rates filed and several local rates, the lawful rate is the sum of the joint rate filed plus the local rates. *C. B. & Q. R. Co. v. United States*, 157 Fed. 830 (C. C. A. of eighth circuit (1907)). It was held in this case that no formal contract was necessary to bring the carrier within the provisions of the law, and that the acceptance by the initial carrier of a through shipment at less than the lawful rates is not made lawful by the fact that such carrier had a contract with a connecting carrier whose line formed a part of the through route; and that the latter would not increase this rate during a certain time; and on the faith of such a contract, made a similar contract with the shipper; and in the meantime the connecting carrier had not in fact published and filed with the commission a new schedule increasing the rate. But it was held in a suit against a shipper, *United States v. Wood et al.*, 145 Fed. 405 (Dist. Ct. of Pa., 1906), that it is not made a criminal offense to receive a rebate from a joint rate unless the rate has been both filed and published, though it was unlawful for a carrier to grant a rebate from a joint tariff rate which it had filed and published and in which it participated when filed and published by another carrier. The participation by a carrier by water on the great lakes in a through bill of lading did not make that a lawful rate as against the shipper, so as to subject him to prosecution for a concession therefrom to him by such carrier. *Camden Iron Works v. U. S.*, 158 Fed. 561 (1908), C. C. A. third circuit.

§ 427. The unit of offense under the act. *The Standard Oil Co. of Indiana Case.*—The act penalizes the acceptance of a rebate by the shipper as well as the payment of a rebate by the carrier. It provides that when a carrier files a rate with the commission and participates in any rate so filed and published, that rate in any prosecution against the carrier shall be deemed to be the legal rate. In a prosecution against the shipper it must be shown that the tariffs were published at least in the office of the railroad company where the shipments were received. In the prosecution against the Standard Oil Company of Indiana it was held in the trial court that each carload shipment, made at the illegal rate where the public rate was in car-

lots, constituted a separate offense, although the freight bills were rendered and paid monthly. *United States v. Standard Oil Co. of Indiana* (Dist. Ct. of N. D. of Ill.), 155 Fed. 305. See also same case on demurrer, 148 Fed. 719. This ruling was reversed by the circuit court of appeals of the seventh circuit, the court holding that the gist of the offense was the receipt of the concession, irrespective of whether the property involved trainloads, carloads, or pounds, and that the transaction was not completed until the shipper received the rate different from the established rate. *Standard Oil of Indiana*, 164 Fed. 376 (1908). The court also held that the district court had erred in excluding evidence that the shipper had no knowledge of the public rate and could not ascertain the same by a construction of the tariff sheets. On the retrial of this case in the district court this ruling was followed; and as the government failed to prove that the tariffs were published at least in the office of the railroad company where the shipments were received, the departure by the shipper from the rates did not constitute an offense. It seems that the freight rates did not contain a classification of rates, but merely referred to the classification published by other parties and were subject to a change by such other parties. *United States v. Standard Oil Co. of Indiana*, 170 Fed. 988 (1909). This ruling as to the unit of offense was followed in *United States v. Bunch*, 165 Fed. 736 (Ark. D. Ct.), (1908), and in *United States v. Sterns S. & L. Co.*, 165 Fed. 736 (D. Ct. of Mich., 1908).

But contra, see *United States v. Vacuum Oil Co.*, 158 Fed. 536 (1908), district court of the western district of N. Y.

In the prosecution of a carrier, *N. Y. C. & H. R. R. Co. v. United States*, 212 U. S. 481, it was said by the supreme court that the offense of giving rebates is complete, when the carrier to whom the shipper has paid the full local rate pays over to the shipper upon a claim presented to him the amount of the rebate stipulated in the agreement under which the shipment was made.

§ 428. Prior contract and want of criminal intent no defense. It was held in the *Armour Packing* case by the supreme court that the acceptance of a rebate by a shipper under a prior contract is violative of the act, since the statute is read into the con-

tract and becomes a part of it, and it is immaterial that the contract was taken in good faith under a claim of right. The only criminal intent requisite to the criminal offense created by statute, which is not *malum in se*, is the purpose to do an act in violation of the statute. No moral turpitude or wicked intent is essential to conviction.

On the other hand, it is proper to show that there was no intent to violate the act; that is, to do what was prohibited by the act. Thus, in the prosecution of a carrier it was held by the circuit court of appeals of the ninth circuit, *A., T. & S. F. R. R. Co. v. United States* (1909), 170 Fed. 250, reversing 163 Fed. 111, that in the prosecution of a carrier for giving a rebate, the intent of the carrier is the essence of the offense, and the departure from the published tariff rates must be willful; that is, the carrier had the right to show in defense that it had accepted in settlement various sums less than the established rate, and the claim of the shipper, that the cars had been loaded with the minimum amount, but that various amounts had been lost in transit, and that the carrier had not exacted freight on the amount so lost, was admissible as showing the absence of intent to violate the act.

The fact that the shipper who contracts for and receives a rebate in violation of the statute receives no benefit therefrom, does not relieve him from criminal liability; but the stockholder in a corporation which has accepted rebates, does not as such become personally subject to the penalties imposed by the statute. *United States v. Wood et al.*, 145 Fed. 405 (D. C. of Pa.) (1906).

§ 429. Conspiracies in rebating.—Every agreement for rebates is in effect a conspiracy to violate the law prohibiting rebates. Prior to the restoration of the penalty of imprisonment, an effort was made to make agreements to give rebates punishable by imprisonment under the general conspiracy statute, section 5440 R. S. *supra*, § 94. But it was held in the southern district of New York by Holt, J., that such a prosecution was not sustainable under the conspiracy statute. *United States v. Gailford et al.*, 146 Fed. 298 (1906). But where the persons charged with the offense are not limited to the giver and the receiver of the rebates, there is a basis for the charge of con-

spiracy. *Thomas v. United States*, 156 Fed. 897 (1907), reversing *United States v. Thomas*, 145 Fed. 74, on the ground of an improper instruction as to presumption of innocence.

§ 430. **What are rebates.**—It has been held that the fact that a rebate is paid to one other than the shipper, was immaterial; but a payment which is bona fide a commission for obtaining business for the carrier, is not within the act. *United States v. Delaware, etc. R. Co.*, 152 Fed. 269 (1907). A railroad company refunding to a shipper the elevator charges for transferring grain from trains to vessels on the lakes was held guilty of rebating, and it was no defense to the prosecution that other carriers did likewise and that competition necessitated the rebate. *Chicago, M. & St. P. R. R. Co. v. United States*, 162 Fed. 885, C. C. A. eighth circuit (1908), affirming 157 Fed. 84. The same court held that the railroad company was guilty of rebating in refunding elevator charges to consignees, where it had actual knowledge that the freight had been paid by these consignees, although the railroad company had not filed a schedule showing it had not absorbed the elevator charge as a part of its rate.

It was held in *U. S. v. Philadelphia Ry. Co.*, 188 Fed. 484 (1911), E. D. of Penn., that the Elkins Act did not apply to a car-load shipped from Hamburg, Germany, destined as stated in the bill of lading to Philadelphia for transportation in bond to Alberta, Canada, and taken to its destination by continuous and uninterrupted transportation at the hands of carriers; there being no delivery or change of title, but the defendant carriers merely assisting in a continuous transportation from one country to another. These facts being submitted to the court the verdict was directed for the defendant railway company, which had been indicted for violation of the Elkins Act. See also *supra* § 145.

A refrigerating company, organized for the purpose of controlling the interstate business of a brewery company, having entered into a contract for rebates with certain railroads, was "a party interested in the traffic," and was therefore subject to the act. *United States v. Milwaukee, etc., R. Co.*, 145 Fed. 1007 (1906). It was held in this case that it was unlawful for a corporation organized to control the interstate transportation of the brewery to demand and receive as a consideration for the routing of the brewery company's product over certain line of railroad a

concession equal to one-eighth or one-tenth of the published freight rates.

It was held by the court of appeals of the seventh circuit, *C. & A. Railroad Co. v. United States*, 156 Fed. 559 (1907), affirming 148 Fed. 646, and affirmed by a divided court in 212 U. S. 563, that the private tracks built by the owner of a packing plant on its own property, extending from the connection with the tracks of a belt line railroad to and around its buildings and used in loading cars for shipments, are not a part of the railroad system, but plant facilities, and the refunding by the railroad company which made and published a schedule of through rates, including the belt line cars, of one dollar per car to such packing company on its shipments, which it made and paid for at the schedule rate, on the ground that it was a payment for the use of its private tracks, was in effect a rebate.

The comprehensive scope of the penal provisions of the Elkins Act was illustrated in the affirmance by the circuit court of appeals of the third circuit, 188 Fed. 879 (1911), of the conviction of the Lehigh Valley Railroad, 184 Fed. 543, on the charge of an unlawful discrimination in making what purported to be a settlement to the Bethlehem Steel Company of demurrage charges. The court said that the demurrage was a proper terminal charge under the act, and when fixed by the rate schedule for a certain district these charges were binding upon the companies and shippers, and any departure therefrom constituted a misdemeanor. In this case it was claimed that there was a basis for a settlement, as the shipper had claimed that the demurrage charges collected by reason of certain exceptions were discriminatory as against them; but the court held that the only legal mode of correcting such discrimination, if it existed, was by proper notice or under authority from the Interstate Commerce Commission. The question, therefore, was submitted to the jury to determine whether the settlement was an honest one or a cover for discrimination; and as the jury, by its verdict, found it was not made in good faith the conviction was sustained.

§ 431. Requisites of indictment under the act.—An indictment under this act is sufficient if it states the offenses with sufficient particularity to fully advise the defendant of the crime charged, and to enable a conviction through it to be

pleaded in bar of another subsequent prosecution for the same offense. *N. Y. C. & H. R. R. Co. v. United States*, 212 U. S., *supra*.

It is not necessary to set out in an indictment against a shipper that the carrier's published rate was a reasonable one, nor set out the tariffs in full, it being sufficient to aver that a certain named rate was in force between designated points as shown by the tariffs. *United States v. Standard Oil Co.*, 148 Fed. 719. It is insufficient to aver, however, that there was an arrangement between several carriers with connecting lines and that a lower total rate as shown by the public tariffs was a certain sum per one hundred pounds on a particular product, but that such product was transported by defendants at the lower rates, as it was not indicative of the existence of the joint through rate lower than the total local rates. See ruling on demurrer in *Standard Oil Case*, 148 Fed. 719, *supra*.

Prosecutions under this act are governed by the R. S. section 1045, as amended in 1876, limiting all prosecutions to three years in cases of misdemeanors. The state statutes have no application. *United States v. Central of Vermont R. R.*, 157 Fed. 291 (Cir. Ct. of N. Y., 1907).

For sufficiency of allegations to charge the establishment of a joint tariff rate and discrimination therein, see *U. S. v. Penn. R. Co.*, 153 Fed. 625 (1907), dist. court of New York. It was held in this case that the burden is on the government to show a common arrangement for a continuous carriage between the points mentioned in the filed joint tariff.

In *U. S. v. Pomeroy* (C. C. of N. Y., 1907), 152 Fed. 279, it was held that a judgment of conviction with sentence of fine was abated by the death of the convicted party after the judgment and before the fine was paid, and that the fine was not recoverable from his personal representative and the court wherein the judgment was rendered had jurisdiction to abate the judgment.

THE ANTI-TRUST ACT OF 1890.

SECTION 1.

- § 432. Section 1 of the act.
- 433. Constitutionality and scope of the act.
- 434. Interstate transportation is subject to the act.
- 435. Unlawful combinations in commerce other than transportation.
- 436. The California Tile Trust case.
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- 441. The Kansas City Live Stock Exchange cases.
- 442. The Chicago Board of Trade Bucket Shop case.
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- 451. Acts done outside of the United States not within the act.
- 452. Patent monopoly not within the act.
- 453. Secret formula contracts under the act.

AN ACT To protect trade and commerce against unlawful restraints and monopolies.

§ 432 (314). Contracts, combinations, conspiracies, in restraint of trade.—*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:* Sec. 1. Every contract, combination in the form of trust, or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

§ 433. Constitutionality and scope of the act.—As to the circumstances of the passage of this act, its constitutionality and

its general construction in relation to the common law of restraint of trade, and as to business and labor combinations in interstate commerce, see *supra*, part I, chapters IV and V. For decisions containing the penal provisions of the act, see *infra* section 2 of the act. Though it has been the subject of very extended discussion as to its relation to the business development of the country both in and out of congress, it has not been amended since its first enactment, therein differing from the interstate commerce act, which has been the subject of frequent amendments.

The first important case decided under the act was the so-called sugar trust case, *U. S. v. Knight Co.*, 156 U. S. 1, 39 L. Ed. 325, decided January 18, 1895 as it determined not only the construction and application of this act, but the limitations of the power of congress in dealing with business combinations or so-called monopolies.

The American Refinery Company had acquired by purchase of stock of other refining companies through shares of its own stock nearly complete control of the manufacture of refined sugar in the United States. The bill filed by the United States charged that the contracts under which these purchases were made constituted combinations in restraint of trade and the relief sought was the cancellation of the agreements under which the stock was transferred, the redelivery of the stock to the vendors and an injunction against the further performance of the agreement. The supreme court affirmed the decree of the circuit court, 60 Fed. Rep. 306, and the circuit court of appeals, 60 Fed. Rep. 934, dismissing the bill (Harlan, J., dissenting). The court said the monopoly and restraint denounced by the act were the monopoly and restraint of interstate trade and commerce. Manufacture was not commerce. Commerce succeeded manufacture and was not a part of it, and sale as an incident of manufacture therefore was distinguished from commerce.

§ 434 (316). Interstate transportation is subject to the act. Transportation is commerce, and the provisions of the act are subject to and cover common carriers by railroads. This application of the act was first made in the Freight Association case, 166 U. S. 290, 41 L. Ed. 1007, decided in 1897, where the court held (Justices White, Shiras, Field and Gray dissenting), that

the agreement of the Trans-Missouri Freight Association for the purpose of mutual protection by establishing and maintaining reasonable rates on all freight traffic, both through and local, between competing carriers, was an unlawful combination within the meaning of the act.

This ruling was reaffirmed at the following term with the same division of the court (Justice Field having retired and his successor Justice McKenna not sitting), in the Joint Traffic Association case, 171 U. S. 505, 43 L. Ed. 259.

These rulings as to the applicability of the act to interstate railroads were again reaffirmed in the Northern Securities case, 193 U. S. 197, 48 L. Ed. 679 (1904), where the court, four judges dissenting, held that the organization of a New Jersey corporation as a "holding corporation" for the shares of competing interstate railroads was an illegal combination and in restraint of interstate commerce. As to these decisions and the concurring opinion of Brewer, J., in the Northern Securities Case, see *supra*, § 76.

§ 435 (317). Unlawful combinations in commerce other than transportation—The Addyston Pipe Trust case.—The leading case as to the application of the statute to unlawful combinations other than railroads, is *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. Ed. 136 (1899), wherein the court unanimously affirmed the judgment of the circuit court of appeals. 29 C. C. A. 141, 85 Fed. Rep. 271. In this case the court held the agreement of certain pipe manufacturers void under the act, on the ground that the purpose of the combination directly and by means thereof was to increase the price at which pipe should be sold within the territory and to abolish all competition between the parties. The court found that the output and price were regulated so as to deprive the public in a large territory of the advantages accruing from proximity of pipe factories, and that the prices were kept just low enough to prevent competition by eastern manufacturers, the parties agreeing to sell only at prices fixed by their committee, and the highest bidder at a secret auction became the lowest bidder at a public letting.

The court laid down the rule in this case that when the direct immediate and intended effect of a contract and combination among the dealers in a commodity was the enhancement

of the price and the suppression of competition, it amounted to a restraint of trade in the commodity, even though contracts at the enhanced price were made and it was not a complete monopoly.

§ 436 (318). **The California Tile Trust case.**—The principle laid down in the *Addyston* case was applied by the supreme court in *Montague v. Lowry*, 193 U. S. 38, 48 L. Ed. 608 (1904), where an association formed in California by the manufacturers of and dealers in tiles, mantels and grates was held obnoxious to the act. Membership in the association was prescribed by rules and dependent on conditions, one of which was the carrying of at least three thousand dollars worth of stock, and whether applicants were admitted or not was a matter of arbitrary decision. The dealers in the association agreed not to purchase materials from manufacturers who were not members and not to sell unset tiles to anyone other than members for less than list prices, which were fifty per cent higher than the prices to members; and the manufacturers who were residents of states other than California agreed not to sell to any one other than members, violations of the agreement rendering the members subject to forfeiture of membership. The court ruled without dissent, that although the sales of unset tiles were within the state of California and although such sales constituted a very small portion of the trade involved, the agreement of the manufacturers without the state not to sell to anyone but members was part of a scheme which included the enhancement of the prices of unset tiles by dealers within the state, and that the whole thing was so bound together that the transactions within the state were inseparable, and became a part of the purpose which when carried out amounted to and was a combination in restraint of trade and commerce. The agreement therefore was brought within the rule declared in the *Addyston* case and distinguished from the *Hopkins* and *Anderson* cases, *infra*, § 440.

§ 437 (319). **The Tennessee, California and Ohio Coal cases.** The same construction and application of the act has been made by the federal circuit courts. In *United States v. Jelico Mountain Coal & Coke Co.*, 46 Fed. 432 (1891), the circuit court for Tennessee held void an agreement between coal mining companies operating chiefly in one state and the deliv-

eries of the coal in another state, creating a coal exchange and fixing the price for the coal at the mines, and the margin of profit to the dealer, and enforcing the same by fines.

In *United States v. Coal Dealers Association of Cal.*, 85 Fed. 252 (N. D. of Cal. 1898), an unincorporated association of coal dealers, regulating distribution and prices in interstate coal traffic, was adjudged illegal.

In *United States v. Chesapeake & Ohio Fuel Co.*, 105 Fed. 93 (1900), the circuit court for the southern district of Ohio followed the *Addyston Pipe & Steel Co. Case* in annulling a contract made by a corporation to take the entire product of a number of producing firms and corporations engaged in the mining of coal, intending to sell the same at not less than a price to be fixed by an executive committee, and to account and pay over to the parties the entire proceeds above a fixed sum to be retained as a compensation, the stated purpose being to enlarge the western market. The court said that the agreement whereunder shipments were to be made in that and other states was one that affected interstate commerce and subject to the provisions of the Anti-Trust Act, and that it was no defense that the agreement had not in fact been productive of injury to the public, or even that it had been beneficial, enabling the combination to compete for the business of a wider field.

§ 433 (320). The Chicago Meat Trust case.—The act was applied in the United States circuit court for the northern district of Illinois in the so-called Meat Trust Case, *United States v. Swift*, 122 Fed. 529, decided in April, 1903. The bill in this case set out that the defendants controlled sixty per cent. of the trade and commerce in fresh meats in the United States, buying the live stock from different parts of the United States, converting it into fresh meats and then shipping the meats to their agents to be sold to consumers in different parts of the United States. The court said that the purchases, shipments and transportation were commercially interdependent, and that it was immaterial that the fresh meats in the hands of the agents of the defendants were subject to ordinary state taxation. The court also said that the allegations of the bill of an unlawful combination to the effect that the purchasing agents were required to refrain from bidding against each other, and in bidding up at times so as to induce large shipments and agreeing

upon prices to be adopted and restrictions upon the quantities of meats to be shipped, and the making of agreements between transportation companies for rebates and discriminating rates, was sufficient to show a violation of the law. The demurrer was overruled and the motion for an injunction was sustained. This judgment was affirmed by the supreme court (no dissent), 1905, *supra*, § 81.

§ 439 (321). The Washington Shingle Trust Case.—In *Gibbs v. McNeeley et al.*, 55 C. C. A. 70, 118 Fed. Rep. 120, 60 L. R. A. 152 (ninth circuit (1902), reversing 107 Fed. Rep. 210 and 102 Fed. Rep. 594), it was held that an association of manufacturers and dealers in red cedar shingles in the state of Washington formed for the purpose of controlling the production and sale of such shingles, which are made only in the state, but are principally sold and used in other states, and by its action in closing the mills of its members, has reduced the production and has also arbitrarily increased the prices at which the product is sold, is a combination in restraint of commerce, in violation of the act of 1890. The court applied the rule of the *Knight* and *Addyston* cases, and said that it was not essential for a contract to refer expressly to interstate commerce, if its purpose and effect were necessarily to restrain such commerce.

§ 440 (322). Incidental restraint of trade not violative of the act.—The contract condemned by the statute is one whose direct and immediate effect is a restraint upon that kind of trade or commerce which is interstate. It does not include regulations which are nothing more than a charge for a local facility provided for the transaction of commerce, nor does it include an agreement among business men for the better conduct of their own business which incidentally effects interstate commerce. The leading cases on this subject are those decided in relation to the Kansas City Live Stock Exchange, *Hopkins v. Union States*, 171 U. S. 578, 43 L. Ed. 290 (1898), and the *Traders Live Stock Exchange of Kansas City*, 171 U. S. 604, 43 L. Ed. 300, wherein the supreme court reversed the judgment of the circuit court in 82 Fed. Rep. 529.

§ 441 (323). The Kansas City Live Stock Exchange Cases.—In the first of these cases the court held that the Kansas City Live Stock Exchange, an unincorporated voluntary association

of men doing business at the stock yards situated partly in Kansas City, Missouri, and partly across the state line in Kansas City, Kansas, doing business as commission merchants, receiving consignments of cattle under rules which prohibited the employment of agents to solicit consignments except upon a stipulated salary, and forbidding the sending of prepaid telegrams or telephone messages as to the conditions of the market, and providing that no member should transact business with any commission merchant of Kansas City not a member of the exchange, or that any person violating the rules or regulations or with any expelled or suspended member after notice of such violation, was not in violation of the act. The court said that the situation of the yards partly in Kansas and partly in Missouri was a fact without any weight, and that such business was not in fact interstate business or commerce. The association merely provided facilities for the transaction of commerce. There must be some direct and immediate effect upon interstate commerce to come within the act. The court in this case cited a number of agreements incidentally affecting commerce which would not be included, as agreements among land owners, enhancing the cost of transporting cattle, or that of railroad employees to cease from work unless paid a certain compensation, saying that these agreements would enhance the cost of interstate commerce, but only indirectly and incidentally.

In *Anderson v. United States*, *supra*, the defendants were not commission men, but were themselves purchasers of cattle on the market. The members bore the same relation to the association and they had carried on the same business as they carried on in the *Hopkins Case*. The court said it was not called upon to decide whether the defendants were or were not engaged in interstate commerce, because the agreement was not one in restraint of trade; nor was there any combination to monopolize or attempt to monopolize such trade within the meaning of the act.

The court in this latter case laid down the general rule that where the subject-matter of the agreement does not directly relate to and act upon and embrace interstate commerce, and where the anticipated facts clearly show that the purpose of the agreement was not to regulate, obstruct or restrain that commerce, but that it was entered into with the object to properly and fairly regulate the transaction of the business in which

the parties to the agreement were engaged, such agreement will be upheld as not within the statute, where it can be seen that the character and terms of the agreement are all calculated to attain the purposes for which it was formed, and where the effect of its formation and enforcement upon interstate trade and commerce is in any event indirect and incidental, and not its purpose or object. These cases were decided with only one dissent, that of Mr. Justice Harlan.

See also *Field v. Barber Asphalt Co.*, 194 U. S. 618, 48 L. Ed. 1142 (1904), where the court held that the specification in an ordinance, that a particular kind of asphalt produced only in a foreign country should be used in a city pavement, was valid under the laws of the state and did not violate the act of 1890 or any federal right.

§ 442. The Chicago Board of Trade Bucket Shop Case.—In *Chicago Board of Trade v. The Christy G. & S. Co.*, 198 U. S. 236, 49 L. Ed. 1031 (1905). The supreme court reversed the circuit court of appeals, eighth circuit, 125 Fed. 161, and affirmed that court of the seventh circuit, 130 Fed. 507; and held that the Chicago board of trade had the right to enjoin the defendants from using and distributing the continuous quotations of prices on sales of grain and provisions for future delivery which were collected by the board of trade and which could not be obtained by the defendants except through a known breach of the confidential terms on which the plaintiff communicated. The court held that contracts with telegraph companies by which the Chicago board of trade limited the communication of quotation of prices of sales of grain and provisions for future delivery collected by it which it might have refrained from communicating to any one, did not make a monopoly or amount to an attempted monopoly, nor did it amount to a contract in restraint of trade either under the Anti-Trust Act or at common law. Justices Harlan, Brewer, and Day dissented.

§ 443. The Calumet & Heckla Mining Co. case.—The circuit court of appeals of the sixth circuit, in *Bigelow v. Calumet & Co.*, in 167 Fed. 721 (1908), affirming 167 Fed. 704, held that the purchase by one Michigan mining corporation of the stock of another expressly authorized by the statute and thereby with the aid of proxies from other stockholders subject to control of

the latter where the two together were shown to produce about one-ninth of the copper product of the country, was not illegal as a combination in restraint of trade or commerce in violation of the anti-trust act in the absence of evidence of an unlawful intent to use the control so as to bring about a monopoly. In this case, the court, opinion by Lurton, J., said that the fundamental rule declared by the supreme court in the Knight case, *supra*, had not been overruled or qualified by subsequent decisions and that its last analysis was but an illustration of the rule that the monopoly or agreement to come within the act must directly and immediately affect interstate commerce.

See also concurring opinion of Judge Cochran. In this case was laid down the rule following the supreme court in the Cinn. Packet Co. v. Bay, 200 U. S. 179, 50 L. Ed. 428 (1906), that a contract is not to be assumed to contemplate unlawful results, unless a fair construction required it upon the established facts.

§ 444. Combinations held to be within the act.—Whether a combination is in restraint of trade within the meaning of the act is thus made to depend upon the intent and purpose of the parties to control the market by eliminating competition. Thus, in Wheeler Stencil Co. v. National Window Glass Association, 152 Fed. 864 (1907), it was held by the circuit court of appeals, third circuit that an agreement between jobbers and wholesale dealers doing business in different states to control a purchasing corporation in the window glass business and through this corporation controlled by them enter into a combination with a manufacturer operating factories in different states and manufacturing seven per cent. of all the window glass in the United States, whereunder the defendant and the dealers agreed to buy window glass from no other manufacturer unless at materially lower rates, and the manufacturer agreed to sell to no other dealers except for higher prices than it charged them, with a further agreement for limiting the quantity of window glass to be purchased by each of the window dealers with the power to arbitrarily fix prices which were to be charged retail dealers, was an agreement to destroy competition and illegal under the act.

Thus, also, an association of books publishers controlling ninety per cent. of the book business of the country which agreed not to sell to persons who cut prices of copyrighted books, was held, in *Mines v. Scribner et al.*, 147 Fed. 927 (1906), by the cir-

suit court in New York to constitute a conspiracy in restraint of interstate trade.

In *Penn. Sugar Refining Co. v. American Sugar Refining Co.*, the circuit court of appeals of the second circuit, 166 Fed. 254 (1908), reversing 160 Fed. 144, held the purchase of a controlling interest in the stock of a sugar refining company so as to acquire control thereof and prevent the corporation from refining sugar in competing with a purchaser so that the latter might control the business, constituted an unlawful conspiracy in restraint of trade under the act.

In the circuit court of appeals of the fifth circuit, *Peoples Tobacco Company v. American Tobacco Co.*, 170 Fed. 396 (1909), it was held that an unlawful conspiracy was stated in the allegation that defendants conspired to render its business unprofitable and to ruin and destroy the same through competing corporations, which they secretly controlled, by enticing away his workmen, by compelling it to pay more than the normal price for leaf tobacco, and to adopt unnecessary and expensive means to sell its products.

In *United States Tobacco Co. v. American Tobacco Co.*, 163 Fed. 701 (1908, S. D. of N. Y.), an agreement between tobacco manufacturers as set forth in a complaint for damages, was held on demurrer to be an unlawful interference with interstate commerce in that it charged an inducement to competitors to maintain arbitrary and non-competitive prices and apportioned the interstate trade and commerce, fixing the amount of business that their customers should do.

See also *Monarch Tobacco Works v. American Tobacco Co.*, circuit court (W. D. of Ky.), 165 Fed. 774 (1908), and *Hale v. O'Connor Coal & Supply Co.*, 181 Fed. 267 (C. C. of Conn, 1908), where the combinations charged were held to be in violation of the act.

See also *Ware Cramer Tobacco Co. v. American Tobacco Co.*, 180 Fed. 160, (C. C. of N. C. 1910).

See also decision of the C. C. A. fifth circuit, in *McConnell v. Connors McConnell Co.*, 152 Fed. 321 (1907), where a corporation organized for monopolizing fruit importing business was held to violate the act.

§ 445. Agreements held not within the act.—Agreements of manufacturers or dealers with their customers for the preven-

tion of dealing with competitors by such customers through the payment of rebates to them conditioned on their not so dealing are not within the act. *Whitwell v. Continental Tobacco Co.*, see *supra*, § 86.

Agreements with customers respecting sales in certain territory, in *Phillips v. Iola Portland Cement Co.*, 125 Fed. 593 (1903), 61 C. C. A. 19, nor the incidental restraint of trade resulting in the purchase of competitors, *In re Green*, 52 Fed. 104 (1892), were held not within the act.

See also *In re Corning*, 51 Fed. 205 (1892), and *In re Tyrrell*, 51 Fed. 218 (1892).

An agreement is not in violation of the act where its effect upon interstate commerce is indirect and incidental only.

See *Ellis v. Inman*, 124 Fed. 956 (D. C. of Oregon 1903).

A contract between the stockholders of a corporation engaged in dealing in fish at different places whereunder, in the purchase of the business and good will, they were not to enter into competition in the business for a term of ten years, was held, in *Booth v. Davis*, 127 Fed. 875 (E. D. of Mich. 1904), to be lawful and enforceable. In this class of cases where the restraint of trade is incidental and ancillary to a lawful contract and reasonable for the protection of rights under the contract, it has been uniformly held that they are not within the act.

See the *Addyston Pipe* case, *supra*.

It was held (Cir. Ct. App., second circuit), *Delaware, etc. R. R. Co. v. Cutter*, 147 Fed. 51 (1906), that a contract by a railroad company with a patron for the conduct of the business of transportation of milk, whereunder he was to receive a percentage of profit earned on the freight carrier and that the rate charged should not exceed those of competing roads, and plaintiff was to have the exclusive privilege of transporting milk over defendant's road so far as permitted by law, was not in violation of the act.

§ 446. *The Standard Oil case.*—In the case of the *Standard Oil Company of New Jersey et al. v. United States*, 221 U. S. 1, 55 L. Ed. — (1911), the supreme court affirmed with modifications the decree of the judges of the circuit court of the eighth circuit, 173 Fed. Rep. 177, and held that the unification of power and control over the oil industry, which resulted from

combining in the hands of a holding company the capital stock of the various corporations trading in petroleum and its products, raised the presumption of the intent to exclude others from the trade and thus centralizing in the combinations the perpetual control of the movement of these commodities in the channels of interstate and foreign commerce. The court said that the aggregation of so vast a capital under the circumstances in evidence showed a purpose to maintain a dominion over the oil industry, not as the result of normal methods of industrial development, but by means of combination which were resorted to in order that the greater power that might be added than would otherwise have arisen, if normal methods had been followed. The presumption thus raised was made conclusive by considering the conduct of the persons and corporations who had been mainly instrumental in bringing about the power in the New Jersey holding corporation.

In answer to the suggestion that a very small percentage of the crude oil thus produced was controlled by the combination, the court said it was no answer to the attempt to monopolize, as substantial power over the crude product was the inevitable result of the absolute control which existed over the refined product, so that the monopoly of the one carried with it the power to control the other. In thus finding that the combination was an unlawful restraint of trade and was an attempt to monopolize, there was no dissent in the court. (As to the decree in this case, see *infra*, § 472). As to the construction of the Anti-Trust Act approved in this case, see *supra*, part I, chap. V.

§ 447. **The American Tobacco Company case.**—In *United States v. American Tobacco Company*, 221 U. S. 106, 55 L. Ed. — (1911), the supreme court, while concurring in the main with the decree of the circuit court of the second circuit, 164 Fed. Rep. 700, made certain modifications in the decree and therefore remanded the case. (As to the decree, see *infra*, § 473.) The supreme court held that the acquisition of dominion and control over the tobacco trade by the principal and accessory and subsidiary corporations as the result of purchasing numerous competitors, in many cases closing out the business when acquired, and of obtaining stock control of other competitors, as well as of concerns manufacturing the elements essential to the suc-

cessful manufacture of tobacco products, brought about in many cases after a ruinous trade war, the parties in interest uniformly covenanting not to engage in the tobacco business, and the former business often continuing ostensibly as an independent concern, violated the provisions of the Anti-Trust Act against combinations in restraint of commerce, by the monopolization or attempt to monopolize any part thereof, whether looked at from the point of view of stock ownership, or from the standpoint of the principal and accessory or subsidiary corporations viewed independently, including certain foreign corporations, in so far as, by contracts made by them, they became co-operators in the corporation.

§ 448. The Powder Trust case.—The circuit judges of the third circuit construed and applied the opinions of the supreme court in the Standard Oil and Tobacco Cases in the case of the so-called powder trust, 188 Fed. 127 (June, 1911). The court found that the combination was based upon an illegal association, and that this illegality was not cured by the formation of a new company for the purpose of acquiring the assets of the other corporations, and vesting the ownership of their plants and the control of their business in that company. The court said the formation of such a corporation and its subsidiaries and the adoption of the new policy was merely a continuance in a different form of the illegal association, and that it constituted a combination in restraint of interstate commerce and to monopolize a part of the same which was unlawful under the Anti-Trust Act. The court discussed the decisions of the supreme court in the Standard Oil Case and American Tobacco Case, and said, "As we read those decisions restraint of interstate trade and restraint of competition in interstate trade are not interchangeable expressions. There may be under the Anti-Trust Act restraint of competition, that does not amount to restraint of interstate trade, just as before the passage of the act there might have been restraint of competition that did not amount to a common law restraint of trade;" adding, "It matters not whether the combination be in the form of a trust or otherwise, whether it be in the form of a trade association or a corporation, if it arbitrarily uses its power to force weaker competitors out of business, or to coerce them into a

sale to or union with the combination, it puts a restraint upon interstate commerce, and monopolizes or attempts to monopolize a part of that commerce in a sense that violates the Anti-Trust Act."

§ 449 (326). Labor combinations.—The act prohibits any combination or conspiracy in restraint of interstate commerce. It was held *In re Debs*, 64 Fed. Rep. 724, U. S. Cir. Ct. N. Dist. of Ill. (1894), in an exhaustive opinion, that the original design in the act was to suppress trusts and monopolies in the form of trusts, which of course would be of a contractual character, but that it was equally clear that a further and a more comprehensive purpose came to be entertained and was embodied in the final form of the enactment. Combinations were condemned not only when they took the form of trusts, but in whatever form found, if they be in restraint of trade, and that was the effect of the words "or otherwise."

The Debs case was taken to the supreme court, where the judgment of the circuit court was affirmed, 158 U. S. 564, 39 L. Ed. 1902 (1895), on the broader ground of the general power of the federal government in respect to interstate commerce. The court said however that this was not because it differed from the circuit court in its construction of the statute of 1890.

In *United States v. Workingmen's Amalgamated Council of New Orleans*, 54 Fed. 994 (1893), the United States circuit court of Louisiana held that combinations of laborers as well as of capitalists in restraint of interstate commerce was violative of the act, and that it was no defense that the origin and general purpose of a strike were innocent and lawful, if they had been turned into an unlawful purpose for the restraint of interstate and foreign commerce, and that a general strike for the discontinuance of labor in all departments of business, including interstate and foreign commerce, enforced by violence and intimidation for the sake of enforcing the employment of none but union men, was unlawful and properly enjoined. See also other cases to same effect at time of industrial disturbances of 1893 and 1894, *Waterhouse v. Comer*, 55 Fed. Rep. 149; *United States v. Elliott*, 64 Fed. Rep. 27, Phillips, J., in western district of Missouri; *United States v. Agler*, 62 Fed. Rep. 826, Baker, J., in District of Indiana; *Thomas v. Railroad Co.*, 62 Fed. Rep. 803, Taft, J., in southern district of Ohio; *Toledo, etc. R. Co.*

v. Pennsylvania Co. et al., 54 Fed. Rep. 730, Taft, J., in northern district of Ohio; Same v. Same, 54 Fed. Rep. 746, Ricks, J. Charge to grand jury by Grosscup, J., 62 Fed. Rep. 828, and by Ross, J., 62 Fed. Rep. 834. See *supra*, chapter VI, Part 1, §§ 91, 92; and also sections 8 and 10 Interstate Commerce Act.

The contrary view was taken in *United States v. Patterson*, 55 Fed. Rep. 605 (1893); but with the exception of this decision the ruling in the Debs case was followed by the other circuit courts.

§ 450. Employment of common agency not necessarily within the act.—It was held by the circuit court of appeals, eighth circuit, in *Arkansas Brokerage v. Dunn*, 173 Fed. 899 (1909), reversing the judgment of the circuit court, that the organization by a number of mercantile jobbers located in the same city, of a brokerage company of which they owned the stock, and the purchase of merchandise required by them from manufacturers and jobbers in other states through such company instead of through other brokers previously patronized, although there was no agreement binding them so to do, and the use of their influence to extend its business, did not constitute a combination or conspiracy in violation of the act. The court said if this expedient affected interstate commerce at all, it was not in a direct, immediate or necessary way which alone would make it obnoxious to the law, but only in an indirect, incidental, and unimportant way not within the denunciation of the law.

§ 451. Acts done outside of the United States not within the act.—In *American Banana Co. v. United Fruit Co.*, 213 U. S. 347 (1909), the court affirmed the U. S. court of appeals of the second circuit, 166 Fed. 261 and the circuit court of New York in 160 Fed. 184, in dismissing a complaint which sought to recover damages upon an alleged conspiracy with soldiers and officials in Costa Rica, acting under governmental sanction, the court saying that all legislation is *prima facie* territorial, and that what defendants did in a foreign country under the facts set forth in the complaint was not within the scope of the statute.

It is immaterial, however, that a combination is made in a foreign country, if it affects the foreign commerce of this country and is put into operation here. Thus, in *Thomsen v. Union Castle Mail S. S. Co.*, 166 Fed. 251 (1908), the circuit court of

appeals of the second circuit, reversing 149 Fed. 933, sustained a complaint which alleged a combination of ship owners to prevent competition between members by maintaining uniform freight rates in South African trade.

It is also immaterial that one of the constituents in a combination of this country is a foreign corporation doing business in this country. In the American Tobacco case, the supreme court held that the circuit court erred in dismissing as to the English companies, which were connected by inter-corporate holdings with the combination in restraint of trade organized in this country.

§ 452. Patent monopoly not within the act.—In *Bement v. New York Harrow Co.*, 186 U. S. p. 76, 46 L. Ed. 1058 (1902), the supreme court said that the object of the patent laws was a monopoly, and that the rule was, with few exceptions, that any conditions which were not in their nature illegal with regard to the kind of property imposed by the patentee and agreed to by the licensee for the right to manufacture, or use, or sell the article, will be upheld by the courts; and the fact that the conditions of the contract keep up a monopoly, does not render them illegal.

This principle has been applied in several cases. Thus, in *Rubber Tire Wheel Co. v. Milwaukee Rubber Works*, in the seventh circuit, the court of appeals, 154 Fed. 358 (1907), reversed the circuit court of Wisconsin in 142 Fed. 331, and held that licenses which were granted by the owner of the patent under an agreement that the licensee should sell the patented article only at prices fixed by the agreement, and restricting the production of the licensee, were valid, the court saying that patented articles unless and until they are released by the owner of the patent from his monopoly, are not articles of trade or commerce among the several states within the meaning of the act, and that provisions in the licenses for the accumulation of a fund for the suppression of competition did not render the licenses invalid.

In the case of *Indiana Mfg. Co. v. Case Threshing Machine Co.*, 154 Fed. p. 365 (1907), the same court, reversing the circuit court of Wisconsin, 148 Fed. 21, held that a contract by a patentee granting licenses to manufacturers to pay complainants a roy-

alty and giving them a right to use invention thereafter acquired by complainant, was not in violation of the act.

In *Virtou v. Creamery Package Mfg. Co.*, it was held by the court of appeals of the eighth circuit, 179 Fed. 115 (1910), that the fact that the owner of a patent was party to an illegal combination in restraint of trade did not deprive him of the right to sue for infringement of his patent, and that the owner of patent could lawfully notify infringers or persons believed to be such of his claims and warn them that suit would be brought to protect his legal rights where he acted in good faith. It was held in this case that a contract which one company made with another, to be its sole agent for the sale of its products, was not in violation of the act, as the effect of interstate commerce was only incidental.

As a patentee still remains the owner of his patent after granting a license, a modification of the licenses between the owners and the various licensees regulating the manufacture and sale of the patented product, is not objectionable as a restraint of trade. *Gosher Rubber Works v. Single Tube Tire Co.*, United States court of appeals, seventh circuit, 166 Fed. 431 (1908).

A modification of the broad principle asserted in the cases above noted, was discussed by the circuit court of Massachusetts in *Blount Mfg. Co. v. Yale & Town Mfg. Co.*, 166 Fed. 555 (1909), where it was said that while a sale or license of a patented article with a covenant not to compete made as an ordinary incident to enhance the value of the thing conveyed was not within the anti-trust act, and where it went beyond this and sought to enhance the price by removal of competition under a general plan to regulate and control the business and dealing in interstate commerce, including the maintenance of the price and the pooling of profits and the elimination of competition and restraint of improvements, it did violate the anti-trust act; and a bill filed to enforce such a contract was held to be bad on demurrer. See § 86, *supra*.

§ 453. Secret formula contracts under the act.—In *Dr. Miles Medical Co. v. John D. Parks & Sons Company*, 220 U. S. 373, 55 L. Ed. — (1911), the supreme court, Justice Holmes dissenting, held that a restraint of trade, which would be unlawful as to the other manufactured articles cannot be justified, because the article in question is a proprietary medicine made

under a secret formula, and that contracts between a manufacturer and all dealers, whom he permitted to sell his products, comprising most of the dealers throughout the country, which fix the price for all sales, whether wholesale or retail, operated as a restraint of trade, unlawful both at common law, and as to interstate commerce under the Anti-Trust Act,—even though such products may be proprietary medicines made under secret formulae; affirming the judgment of the circuit court of appeals of the sixth circuit, 164. Fed. 803. The court said there was no analogy to the right secured by letters patented, and that the value of the so-called proprietary medicines unpatented stood on no other footing than other manufactures. The case was not analogous to a sale of good will, or of an interest in a business or of the grant of a right to use a process of manufacture, and that the agreement was designed to maintain prices after the complainant had parted with the title to the article sold, and to prevent competition of those who trade in them. The court said further that “where commodities have passed into the channels of trade and are owned by dealers, the validity of agreements to prevent competition, and to maintain prices is not to be determined by the circumstances, whether they were produced by several manufacturers, or by one, or whether they were previously owned by one or by many; the complainant having sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic.”

The decision in this case not only overruled the decisions in the circuit court in sustaining these proprietary medicine contracts, (see 149 Fed. 858), but the reasoning of the opinion condemned all contracts between vendor and vendee whereunder the vendor undertakes to control the prices on goods sold after parting with the title thereto. The decision is however to be distinguished from cases such as *Witwell v. Continental Tobacco Co.*, *supra*, where the purpose and effect of the agreement is not to control prices in the hands of the vendee, but to protect the trade of the vendor from competitors. See § 86, *supra*.

SECTION 2.

§ 454. Section 2 of act.

455. Criminal procedure under the act—Sufficiency of indictments.

456. The Chicago Meat Trust indictment.

457. Criminal conspiracy under the act—the overt act.

458. Limitation of prosecutions for conspiracy.

459. Sufficiency of indictment for conspiracy.

460. Corporation indictable for criminal conspiracy.

461. Indictability of conspiracy to run a corner.

462. Immunity of witnesses in criminal prosecutions under act.

463. The plea of *nolo contendere*.

§ 454 (327). Persons engaging in monopolies guilty of misdemeanor.—Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign Nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

(As to what constitutes a monopoly or attempt to monopolize under this section under the construction of the act by the supreme court in the Standard Oil and Tobacco Cases, see *supra*, § 83.)

§ 455 (328). Criminal procedure under the act—Sufficiency of indictment.—The first section of the act condemned two distinct things, a contract in restraint of trade and a combination or conspiracy in restraint of trade, and it was held in *Rice v. Standard Oil Co.*, 134 Fed. 464, Dist. N. J., January, 1905, that these distinct offenses should not be confused either in indictments or in civil suits, citing *United States v. Cadwallader*, 59 Fed. 677 (1893). The second section makes a distinct offense, that of monopolizing or attempting to monopolize any part of trade or commerce among the states.

The act does not define what is a monopoly any more than it does what is a conspiracy in restraint of trade, and resort must therefore be had to common law for a definition of these general terms. In *re Green*, 52 Fed. 104, 1892. It is insufficient in an indictment to simply follow the language of the act, for the reason

that the words of the statute do not of themselves fully, directly and clearly set forth the elements necessary to constitute the offense intended to be punished.

For the essentials of indictment for violation of the Act, see *In re Corning and United States v. Greenhutt et al.*, 51 Fed. 205, northern district of Ohio, 1892, and *In re Tyrrell*, 51 Fed. 213, circuit court southern district of New York, 1892; *In re Greene*, circuit court southern district of Ohio, 52 Fed. 104, 1892; *United States v. Nelson*, 52 Fed. 646, district court district of Minnesota, 1892; and Charge to the grand jury by Grosscup, J., 62 Fed. 828 (1894), and by Ross, J., 62 Fed. 834, in southern district of California, 1894.

It was held in these cases that it was not sufficient to simply follow the language of the statute, but that the indictment must contain a certain description of the offense and a statement of the facts constituting the same.

See also Charge to grand jury, E. D. of Ga., by Judge Speer, 151 Fed. 834 (1907), on the essentials of a combination and restraint of interstate commerce.

In *U. S. v. American Naval Stores Co.*, C. C. S. D. of Ga., 186 Fed. 592 (1909), it was held that an indictment charging a conspiracy to violate the act that monopolizing or an attempt to monopolize were separate offenses and could not be included in one of the indictment. The court said that it was important that the defendants should know whether the government would proceed to prove that the defendants monopolized or attempted to monopolize.

These decisions, that an indictment under the act could not merely follow the language of the statute in charging a contract or combination in restraint of trade or a monopolizing, or attempt to monopolize interstate trade or commerce, but must contain a statement of the facts constituting the offense charged, were rendered prior to the definite construction of the act by the decisions of the supreme court in the *Standard Oil and Tobacco Cases*, and the correctness of this ruling is clear in the light of these decisions. It is not every restraint of trade which is illegal and criminal; but such restraint of trade, as would have been illegal and unenforcible at common law, is penalized by the statute. In a criminal prosecution therefore under this act, the indictment must set forth the facts

constituting the offense, and the jury must determine under the instructions of the court, whether the facts shown in evidence, constitute an undue restraint of trade, or an attempt to monopolize.

Prosecutions under this act are therefore sharply distinguished from those under the Interstate Commerce Act as amended. Under the latter facts constituting criminal violations of the act are clearly and specifically stated. The railroad is bound to publish its rates, and any failure so to do, or any deviation therefrom is penalized. We have a directly contrary condition in criminal prosecutions under the Anti-Trust Act. (As to criminal provisions of act see address of Hon. W. B. Hornblower before American Bar Association, 1911.)

The sufficiency of an indictment under the Anti-Trust Act has not yet (1911), been definitely passed upon by the supreme court. The question was argued in *U. S. v. Kissel*, 218 U. S. 601, 54 L. Ed. p. 1168 (December, 1910), wherein the United States had taken out a writ of error from the judgment of the circuit court, S. D. of N. Y., sustaining a plea in bar of the statute of limitations to an indictment, charging a conspiracy to restrain trade and monopolize; but the court confined its opinion to the single question of the sufficiency of the plea. See *infra*, § 457.

The sufficiency of allegations in indictments under the act is also considered in *U. S. v. McAndrews & Forbes Company, et al.*, 149 Fed. 823 (1906), S. D. of N. Y., where the court held the allegations of the indictment sufficient, and in *U. S. v. Patten*, 187 Fed. 664, S. D. of N. Y. (March, 1911), the "Cotton Corner" Case. See *infra*, § 461. See also *U. S. v. Maurer*, 188 Fed. 127 (Powder Trust Case).

§ 456. The Chicago Meat Trust indictment.—In *U. S. v. Smith* (May, 1911), the circuit court, N. D. of Illinois, considered the sufficiency of indictments in overruling demurrers filed in the so-called meat trust cases. The contention was made that the penal provisions of the act were too indefinite and uncertain in defining the elements or constituents of the crime to justify indictments thereunder. The court said that the act was primarily a criminal statute. The equitable remedies provided in the act to be enforced by the equity courts, were made dependent upon the criminal sections; and unless

an act which was sought to be enjoined under section 4 was a crime it could not be enjoined, because it was only that which was made a crime by the statute which was subject to the equity jurisdiction. The court, therefore, concluded that the supreme court, in sustaining the validity of the act, had in effect determined that the offenses therein enumerated were defined with sufficient accuracy. The court said that the facts charged in the indictment were substantially the same as those set out in the bill in equity, which had been filed against the same defendants under section 4 of the act, and which had been held sufficient by the circuit court and the supreme court. See *Swift & Co. v. U. S.*, 196 U. S. 375, *supra*, where the court said, "The scheme as a whole seems to us within reach of the law;" and the court concluded in the light of that decision and upon principle the indictment in the case stated facts which amounted in law to a violation of the act. The indictment in this case set out with particularity the control by the defendants of three extensive packing concerns doing an interstate business and that they had combined together in a plan to eliminate competition between such concerns by agreement not to compete against each other for live stock, but to bid exactly the same amount for like grades, and by fixing a universal selling price to be charged by each, and apportioning among themselves the total business done according to the financial interest of each. The court held that this was sufficient to enable the accused to make their defense.

§ 457. Criminal conspiracy under the act—The overt act.—Both the first and second sections of the act penalize a combination or conspiracy, and a conspiracy to restrain or monopolize trade is therefore a criminal offense under the act. A conspiracy in its legal sense is a misdemeanor at common law and has been defined as an agreement by two or more persons to do an illegal act or to do a legal act by illegal methods. Under 5440 U. S. R. S., see *supra*, § 94, the parties to a conspiracy, to commit any offense against the United States, or to defraud the United States, are liable to punishment, provided one or more of the parties to the conspiracy do some overt act in furtherance of the conspiracy. Neither in section one in penalizing a conspiracy to restrain trade or in section two as to a conspiracy to monopolize trade, is there any requirement of an

overt act to complete the offense, though under the conspiracy statute, Sec. 5440, an overt act in furtherance of the conspiracy is essential.

It was held in *U. S. v. Kissel*, 173 Fed. 823 (1909), and in *U. S. v. Patten*, *supra*, that the Anti-Trust Act is independent of the earlier conspiracy enactment, and that there was no warrant for reading its limitations into this separate and distinct enactment. It followed that counts containing no averments of overt acts were not for that reason insufficient. In the *Kissel* Case (*infra*), the supreme court considered the overt acts, set out in the indictment, but did not pass upon the necessity of their averments as essential to the completion of the offense.

§ 458. Limitations of prosecutions for conspiracy.—In the *Kissel* case it was held by the district court that a conspiracy in restraint of trade was nothing but a contract or agreement between two or more persons in restraint of trade, and that the three year statute of limitations began to run from the time when the agreement was complete, and the demurrer to the special plea involved was therefore overruled. The supreme court on writ of error (December, 1910), 218 U. S. 601, 54 L. Ed. 1168, reversed this ruling and held that the indictment charged a continuing conspiracy, and although a contract was instantaneous, a conspiracy was a criminal partnership and might endure for years, and a conspiracy in restraint of trade was different from and more than a contract in restraint of trade. The court said that while the special plea was bad, all defenses, including the defense that the conspiracy was ended by success, abandonment or otherwise more than three years before the indictment, would remain open for consideration under the general issue.

§ 459. Indictments for conspiracy—Sufficiency.—It was held in *U. S. v. McAndrews & Forbes Co.*, S. D. of New York, 149 Fed. 823 (1906), that it was not necessary that the combination should involve a total suppression of trade or a complete monopoly, but that it was sufficient that the necessary operation of the combination tended to restrain interstate commerce and to deprive the public of the benefit of free competition. It was not necessary to set out any precise time when the purpose was formed, or the plan of the conspiracy was first de-

vised. It was sufficient to allege the time when the several cases relied on to establish the offense were done.

The court said that the term "conspiracy" in the Anti-Trust law was to be interpreted independently of the preceding words, and must depend upon the concerted action of two or more persons to accomplish an unlawful result by any means, or a lawful result by unlawful means. The terms were wide enough to cover not only the suppression of the trade of competitors by wrongful means, but every restraint of interstate trade, if it can be accomplished by a predetermined and conceded action of two or more individuals. The indictment in this case was held sufficient. See also *U. S. v. Va. & Car. Chem. Co.*, 163 Fed. 66, (D. Tenn. 1908) where the court held the indictment sufficient, but ordered it quashed because of the presence of unauthorized persons before the grand jury.

§ 460. Corporations indictable for criminal conspiracy under the act.—In *U. S. v. McAndrews & Forbes Co.*, *supra*, the court held there was no improper joinder in an indictment of a corporation and the individual officers of a corporation as principal conspirators. The court said that there was nothing inherently impossible in the corporation's doing one thing and the individuals' another at or about the same time, which things were utterly different; yet all, when dovetailed together, go to make up the joint product labeled by the act combination, conspiracy, and monopoly. It was conceivable that the evidence might show that the individual defendants were not pre-agents but acted under a species of corporate coercion; but this question could not be determined on demurrer. The court said that the dogma that a corporation could not be indicted for an offense which derived its criminality of evil intention was but the remnant of a theory always fanciful and in process of abandonment. It was as easy and logical to ascribe to a corporation an evil mind as it was to impute it with a sense of contractual application. The demurrers to the indictment were, therefore, overruled.

§ 461. Indictability of conspiracy to run a corner.—In *U. S. v. Patten, et al.*, 187 Fed. 664, C. C. S. D. of N. Y. (March, 1911), the court sustained a demurrer to those counts

of the indictment for alleged conspiracy in violation of the Anti-Trust Act which was charged to consist in the running of a corner in cotton. The court said that while a corner was illegal because it was a combination which arbitrarily controlled the prices of commodity, it could not be called a combination in restraint of competition since the going up of price incident to the creation of the corner necessarily increased competition; and as no monopoly existed when individuals, each acting for himself, owned large quantities of commodities, the indictment was fatally defective as alleging only a scheme to demand monopolistic prices as the result of individual as distinguished from collective power. The indictment in this case was for a conspiracy to monopolize, and such an indictment was insufficient where it failed to show a conspiracy, if successfully carried out, would have resulted in a monopoly.

This case has been taken by writ of error by the United States to the supreme court, so that it may be definitely determined whether the attempted artificial control of a market in "running a corner" is not an "attempt to monopolize" under the later decisions construing the act.

§ 462. The immunity of witnesses in criminal prosecutions. As to the general subject of immunity of witnesses and self incrimination in prosecution under this act and under the Interstate Commerce Act, see *supra*, § 12; *infra*, § 488. It was held in *U. S. v. Swift*, N. D. of Illinois 186 Fed. 1002 (1911), that the Immunity Act Feb. 11, 1893, which was made applicable by the Act of Feb. 14, 1903 to the giving of testimony before the department of commerce and labor acted as a general amnesty for offenses arising out of the transaction to which the testimony alleged, but it was not a shield against prosecution for offenses committed after the testimony is given of the testimony furnished. This ruling was applied to the case of a conspiracy, and it was held that the acquittal of the defendants on 1905 for the conspiracy on the ground that they had been made immune from prosecution by reason of testimony given before the commissioner of corporations did not extend to subsequent prosecutions for continuing the same offense thereafter, nor did it obliterate the facts testified to, which if legally important and relevant might be shown in a subsequent prosecution.

§ 463. The plea of nolo contendere.—In certain of the district courts in criminal prosecutions under the act a plea of nolo contendere has been tendered by the defendants and accepted by the court, and fines imposed as a punishment. This plea is recognized in some jurisdictions in misdemeanor cases (12 Cyc. 354) and when accepted by the court is an implied confession of the crime charged, and is therefore equivalent to a plea of guilty except that it gives the accused an advantage of not being estopped to deny his guilt in a civil action based upon the same facts, as he would be on a plea of guilty. See 2 Hawkins P. C. c. 31, Sec. 3. In other words, it is an admission of guilt, but not of facts, alleged as a basis of the charge of guilt.

SECTION 3.

§ 464. Section 3 of the act.

465. Territories and district of Columbia included.

§ 464 (329). Section 3 of the act.—SEC. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States and foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments in the discretion of the court.

§ 465 (330). Territories and district of Columbia included. This section, it will be seen, differs from section 1 only in the fact that it includes in the contracts in restraint of trade declared illegal and criminal not only those made in commerce among the several states and with foreign nations, but also those made in any territory of the United States or of the district of Columbia, or between any such territory and another, or between any such territory or territories and any state or states, and also between the district of Columbia and any state or foreign states. This inclusion of contracts in a territory or in the district of Columbia is not under the authority of the commerce clause of the constitution, but under the general governmental power vested in congress over the territories of the United States and over the district of Columbia. *Congress in the exercise of its power to organize and govern its territories combine the federal and state authority*, *Mormon Church v. United States*, 136 U. S. 1. Congress is also vested by the constitution with the exclusive legislative authority over the district of Columbia. *Constitution of U. S., art. IV, sec. 3, par. 2; art I, sec. 8.*

SECTION 4.

§ 466. Section 4 of the act.

467. Procedure in equity under the act.

468. Right of statutory injunction limited to the government.

469. The act under the general equity jurisdiction of the court.

470. A state cannot enjoin under the act.

471. Suits by the government for dissolution of unlawful combinations, procedure.

472. A decree in the Standard Oil case.

473. A decree in the American Tobacco Co. case.

§ 466 (331). Courts may prevent and restrain violations.—
Sec. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

§ 467 (332). Procedure in equity under the act.—The right of the United States to proceed by injunction against illegal combinations under this act has been uniformly sustained. Thus in the Trans-Missouri Freight Association case the court said that the government had the power to bring the suit to enjoin the association from proceeding, although the association had been dissolved pending the suit before the decree was entered. This ruling was followed in the other cases cited, the Joint Traffic Association case and the Northern Securities case. In the latter case the court enjoined the corporation organized under state laws from exercising the powers acquired by virtue of the acquisition of the stock of the subsidiary companies.

In such a suit filed by the United States a restraining order may be issued with notice, and where the unlawful combination acts as an unincorporated association, it is sufficient that the as

sociation with a number of its officers and members are made parties; it is not necessary that all of its numerous membership should be made parties. *United States v. Coal Dealers Assoc. of Cal.*, 85 Fed. 252 (N. Dist. of Cal., 1898).

§ 468 (333). **Right to statutory injunction limited to the government.**—Under this act a court of equity is not authorized to entertain a bill by a private party to enforce its provisions, the remedy being limited to the government of the United States. See *Gulf, Colorado & Santa Fe R. Co. v. Miami Steamship Co.*, 30 C. C. A. 142, 86 Fed. 407 (1898); *Southern Indiana Express Co. v. United States Express Co. et al.*, 35 C. C. A. 172, 92 Fed. 1022 (1899); *Pidcock v. Harrington*, 64 Fed. 821 (1894); *Block v. Standard Dist. Co.*, 95 Fed. 978 (1899).

The court said in the first cited case however that it did not doubt the general jurisdiction of the circuit court as a court of equity to afford preventive relief in a proper case against threatened injury about to result to an individual from any unlawful agreement, combination or conspiracy in restraint of trade. The distinction is between the statutory remedy conferred by the act and the general jurisdiction of the court of equity to grant equitable relief, where irreparable injury or other conditions for the exercise of equity jurisdiction exists.

In this latter class of cases, where the general jurisdiction of a court of equity is invoked, and no rights under the constitution and laws of the United States are in question, the jurisdiction of the federal court must be based upon the diverse citizenship of the parties. See *Hagan v. Blindell*, 6 C. C. A. 86, 56 Fed. 696, affirming 54 Fed. 40.

Where however the equity jurisdiction of a circuit court of the United States is invoked on the ground of a property right under the constitution or laws of the United States, for protection against any illegal combination threatening such property right, the court would have jurisdiction irrespective of diverse citizenship. See section 8, Interstate Commerce Act.

§ 469. **The act under the general equity jurisdiction of the court.**—The equity jurisdiction of the circuit court, therefore, has been invoked by private parties where there is diverse citizenship, and on grounds for the exercise of the equity powers of the court. The equitable relief, however, must be a protection

against irreparable injury to the complainant, and can not extend to the dissolution of the combination on the ground of injury to the public, as that procedure would be open to the government only. See *National Fire Proof Co. v. Mason Bldg. Assn.*, C. C. A. second circuit, 169 Fed. 259 (1909), affirming 145 Fed. 260.

The jurisdiction of equity has also been sustained where a stockholder of a corporation has alleged the refusal of the corporation to maintain an action at law for damages and he is compelled to resort to equity on account of such refusal of the corporation to act. See concluding remarks of opinion in *Ames v. American Telephone & Telegraph Company*, circuit court Mass., 166 Fed. 820 (1909).

See also *Bigelow v. Calumet & Heckla Mining Co.*, 167 Fed. 721 western district of Michigan, where a stockholder was held entitled to sue to restrain another corporation which had obtained the control of a majority of its stock from voting the same and eliminating competition between the two companies to the irreparable injury of complainant. (This case was ultimately decided on the merits in favor of the defendant.)

In *Shawnee Compress Co. v. Anderson*, 209 U. S. 423, 52 L. Ed. 865 (1908), the supreme court affirmed the judgment of the supreme court of the territory of Oklahoma, 16 Okla. 231, in reversing the decree of the district court of the territory in favor of the defendants in a suit by minority stockholders to cancel a lease of the corporate property with directions to enter judgment for plaintiff, relief being granted on the ground, wherein the supreme court concurred, that the lease was part of a scheme to permit a monopoly of the business in the territory.

§ 470 (334). A state cannot enjoin under the act.—Neither can a state proceed under the act by injunction. Thus in the *State of Minnesota v. Northern Securities Co.*, 194 U. S. 48, 48 L. Ed. 870, the supreme court held that the state of Minnesota could not maintain a suit in its political character to enforce the Anti-Trust Act of congress, as the statute confines the action to suits by the several district attorneys of the United States in their several districts under the direction of the Attorney-General. The court said that the purpose was to secure the uniformity of the enforcement of the act so far as direct procedure in equity was concerned, according to the uniform

plan applicable throughout the entire country. This case had been brought in the state court and removed by the defendant to the circuit court of the United States, on the ground that it was one arising under the constitution and laws of the United States. The circuit court sustained the jurisdiction and dismissed the bill upon the merits. 123 Fed. 692. But the supreme court reversed the decree, with directions to remand the case to the state court on the ground that the circuit court of the United States could not acquire jurisdiction of such proceeding, although both parties urged the court to take jurisdiction, as the State of Minnesota was not a citizen within the meaning of the constitution, and there was no diverse citizenship to sustain the jurisdiction of the federal court.

§ 471. Suits by the government for dissolution of unlawful combinations.—*Procedure*: It was claimed in the Standard Oil Case, *supra*, § 446, that the circuit court erred in overruling exceptions on the ground of impertinence of so much of the bill filed by the United States, as counted upon facts occurring prior to the Anti-Trust Act. But the court held that this ruling could not be regarded as prejudicial error where the court gave no weight to the testimony adduced in the averments complained of, except as far as it tended to throw light upon the acts done after the passage of the statute, the results of which it was charged were being participated in and enjoyed by the alleged combination at the time of filing the bill.

In *Union Pacific Coal Company v. United States*, 173 Fed. 737 (1909), it was held by the circuit judges of the eighth circuit that a combination between a corporation and its officers or agents could not be formed by the efforts of the officers or agents alone without the conscious participation in it by any other officer or agent of the corporation, and that conscious participation of two or more minds is indispensable to an unlawful combination. Neither were non-participating stockholders criminally liable for a violation of law by the corporation wherein they did not participate.

In *Alexander v. U. S.*, 201 U. S. 117, 50 L. Ed. 686 (1906), it was held that orders of a federal circuit court, directing witnesses to answer the questions put to them and produce written evidence in their possession, on their examination before a special examiner appointed in a suit brought by the United States

to enjoin an alleged violation of the Anti-Trust Act, lacked the finality requisite to sustain an appeal to the supreme court.

§ 472. The decree in the Standard Oil case.—In the Standard Oil Case, the decree entered by the circuit court ordered the dissolution of the New Jersey holding corporation, and enjoined the subsidiary corporations and their stockholders from making any agreement tending to bring about further violations of the statute. This was criticised as too broad and of itself preventing legitimate business transactions. The supreme court said that it was not capable of any such construction and therefore could not produce any harmful results. The decree should be construed, not as depriving the stockholders of the corporations of the power to make lawful and normal contracts and agreements after the dissolution of the corporation, but as restraining them from by any device whatever creating directly or indirectly the illegal combination which the decree dissolved.

In this case the court said that in view of the magnitude of the interests involved and their complexity, the thirty days for executing the decree was too short, and it was extended so to embrace a period of at least six months; and that in view of the possible injury to result to the public from the decree prohibiting interstate commerce in petroleum and its products, the injunction against the carrying on of interstate commerce by the New Jersey corporation and the subsidiary companies until the dissolution of the company should not have been awarded. The case was therefore remanded with the affirmance of the decree with these instructions, and the circuit court was authorized to retain jurisdiction to the extent necessary to compel compliance in every respect with its decrees. (With respect to the modifications and also as to the decree in the Tobacco case, Justice Harlan dissented, though concurring in the findings of the court.)

§ 473. The decree in the American Tobacco Company case.—In the American Tobacco Case, *supra*, § 447, where the supreme court without dissent found that there was an unlawful combination in restraint of trade and an attempted monopolization of the business, the court said that with respect to the remedy the situation involved difficulties greater than were presented in any anti-trust case which had been considered by the court. The mere decree forbidding stock ownership by one party to the combination of another part would afford no adequate measure of

relief since the different ingredients of the company would remain unaffected, and that the settled device which had been resorted to made it difficult to formulate a remedy; and because the tobacco business had been so separated under various subordinate companies and so unified by the control acquired by the scheme condemned, that any specific form of relief might operate really to injure the public, and may be to perpetuate the wrong. The court therefore found it inexpedient to allow a permanent injunction against all parts of the combination, or to direct the appointment of a receiver of all the property in all its ramifications. Considering the complexity of the situation, therefore, the court decreed that the combination was in restraint of trade and an attempt to monopolize, and that the circuit court should be ordered to hear the parties by evidence or otherwise for the purpose of ascertaining and determining upon some plan or method of dissolving the corporation and of recreating out of the elements now composing it a new company which should be honestly in harmony with the law, and not repugnant to the law. Six months was allowed from the receipt of the mandate to accomplish these purposes, with leave, however, in the event the necessities required it in the judgment of the court below, to extend such period for a further time, not exceeding sixty days, and that if, in the event that this condition of disintegration was not brought about in this time it should be the duty of the court, either by way of injunction, or by the appointment of a receiver, to give effect to the requirements of the statute; and the court concluded:

“Pending the bringing about of the results stated, each and all of the parties, individuals as well as corporations, should be restrained from doing any act which might thereafter extend or enlarge the power of the combination by any means or device whatsoever.”

The circuit judges under this decree approved (Nov. 1911) the plan or reorganization whereunder the assets of the “trust” were distributed pro rata to the stockholders organized in four new companies; and the attorney-general announced that no appeal would be taken by the United States therefrom. Such pro rata distribution of the assets of a combination adjudged illegal was approved by the supreme court in the case of the *Northern Securities Company v. Harriman*, 197 U. S. 244, 49 L. Ed. 739, 1905.

SECTION 5.

§ 474. Section 5 of the act.

475. Judicial application of section.

§ 474 (335). **Additional parties may be summoned.**—Sec. 5. Whenever it shall appear to the court before which any proceeding under section four of this act may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof.

§ 475. **Judicial application of section.**—The comprehensive jurisdiction vested in the court under this section is enforced by the provisions of the act of February 11, 1903, known as the Expedition Act, *infra*, § 490, whereunder suits in equity brought by the United States may be given precedence over others on the certificate of the attorney general as to the general public importance of the suit.

The provision of this section however, whereunder the court can order parties to be summoned residing in other districts and can direct subpoena to be served in any district by the marshal thereof, only applies to suits in equity, that is, to statutory injunctions brought by the government under section 4 of the Anti-Trust Act. It does not apply to private actions for damages under section 7 of the act, which can only be brought in the district where the defendant resides or is found. Under the Elkins Act, § 422, *supra*, criminal prosecutions brought under the Interstate Commerce Act must be brought in the district where the violation is committed, or through which the transportation may have been conducted.

The jurisdiction vested in the courts in this class of proceedings, enabling the government to select a forum in any state, where anyone of the defendants is a resident, was illustrated in the Standard Oil case, wherein there were some seventy-one corporate and partnership defendants and several individual defendants and only one of the numerous defendants, the Waters-Pierce Oil Co., was a resident in the district in which the suit

was commenced, and the only defendant served with process therein. Contemporaneously with the filing of the bill, the court made an order under this section to serve process upon all the other defendants, wherever they could be found. This jurisdiction was sustained by the circuit judges, see 152 Fed. 290, and also on appeal by the supreme court, *supra*, which held that under this section the court took rightful jurisdiction over the case, and properly ordered notice to be served upon the non-resident defendants. As to parties in suit in equity by United States, see also Powder Trust Case, 188 Fed. 151, *supra*.

There is no provision in the Anti-trust Act as to the court wherein criminal offenses shall be prosecuted. Such prosecutions must therefore be had in the district where the offense is committed. See cases cited, § 455.

SECTION 6.

§ 476. Section 6 of the act.

477. Enforcement of seizure of goods under section 6.

§ 476 (336). Seizure and condemnation of property.—Sec. 6. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section one of this act, and being in the course of transportation from one State to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law.

§ 477 (337). Enforcement of seizure of goods under section 6.—The seizure of goods authorized under section 6 can be enforced only by the procedure like to that provided by sections 3309-3391 R. S. U. S. for the forfeiture of goods under the customs laws, and with trial by jury. There is no reported case of such proceeding under this section. The seizure cannot be enforced in an equity suit by the United States under section 4. *Addyston Pipe & Steel Co. v. United States*, 29 C. C. A. 141, 85 Fed. 271, 1890.

It was said in this case by Taft, J., that the only remedy which can be afforded under section 4 is a decree of injunction.

SECTION 7.

§ 478. Section 7 of the act.

479. The section construed by the supreme court.

480. Plaintiff must show injury.

481. State is not a "person or corporation" under this section.

482. Pleadings under section 7.

483. Danbury Hat case.

484. Measure of damages under the section.

485. The act as a defense in suits by alleged illegal combinations.

486. No recovery under act for violation of Interstate Commerce Act.

487. Limitations.

488. Self-incriminating testimony under the act.

§ 478 (338). Persons injured may recover threefold damages and attorney's fee.—SEC. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

§ 479 (339). The section construed by the supreme court.—This section was construed by the supreme court in *Montague v. Lowry*, *supra*, affirming the judgment of the circuit court of appeals for the ninth circuit, 115 Fed. 27, and of the circuit court (N. Dist. of Cal.) 106 Fed. 38, for treble damages and attorney's fees in favor of a firm which had endeavored to procure tiles for the purposes of their business from the tile manufacturers, members of the association, who refused to deal with them because they, the plaintiffs, were not members of the association. Plaintiffs were not eligible to membership in the association, because they did not always carry stock worth \$3,000, which was made a condition of eligibility to membership. It was claimed that this provision had not been enforced. But the court said there was nothing to prevent its enforcement at any time, if an application was made by any one who did not fill the condition. The proof showed that by reason of the formation of the association plaintiffs had been injured in their business, because they were unable to procure tiles from the man-

manufacturers at any price or from the dealers at San Francisco at less than the list price which was more than fifty per cent above the price at which members of the association could purchase the same.

In this case the jury found a verdict for \$500 and judgment was rendered for treble this amount, and in addition thereto the court allowed \$750 for attorney's fees. The trial lasted five days. The court said that the amount of the attorney's fees was within the discretion of the trial court reasonably exercised, and that the discretion was not abused.

The section was also construed by the supreme court in the case of *Chattanooga Foundry Works v. Atlanta*, 203 U. S. 390, 51 L. Ed. 241 (1906), affirming the circuit court of appeals, sixth circuit, 127 Fed. 25. In this case three-fold damages were recovered by the city of Atlanta, Ga., in the circuit court of Tennessee against two Tennessee corporations which were members of the combination held unlawful in the *Addyston Pipe & Steel Co.* case. See *supra*, § 84. The plaintiff was engaged in conducting a system of waterworks, and it was held entitled to recover the difference between the price paid and the fair price the city would have had to pay under natural conditions for water pipe, together with attorney's fee; and the judgment trebled the damages allowed by the jury. The court said there was no doubt that congress had power to authorize a recovery for the damage, although the latter was suffered wholly within the boundaries of one state, and that it was immaterial that there was no direct contract between plaintiff and the defendants.

§ 480 (340). Plaintiff must show injury.—The fact of an illegal combination in an industry does not establish a right of private action for damages, unless plaintiff shows injury directly accruing to himself by reason of the illegal combination; but an allegation that plaintiff is in the business affected by the combination, and by reason thereof is unable to make purchases and suffers loss thereby, is sufficient. *Gibbs v. McNeeley*, 102 Fed. 594, reversed in 55 C. C. A. 70, 118 Fed. 120, 60 L. R. A. 152 (1902).

It is not necessary that plaintiff should be engaged himself in the business of interstate commerce if he has suffered injury in

his business or property by reason of anything forbidden by the act. See *City of Atlanta Case*, *supra*.

The stockholder or creditor of a corporation, which has been made bankrupt by reason of an unlawful combination violative of this act, has no right of action therefore for damages under this section, as the right of action in such case belongs to the corporation or its trustee in bankruptcy. See *Loeb v. Eastman Kodak Company* (C. C. A., third circuit 1910), 183 Fed. 704; *Ames v. American Telephone & Telegraph Co.* (*infra*), 166 Fed. 820 (1909). See also section 4, *supra*.

§ 481 (341). A state is not a "person or corporation" under section 7.—In *Lowenstein v. Evans*, 69 Fed. 908 (1895), a demurrer was sustained to a suit filed by a liquor dealer in South Carolina under the seventh section of the act against the members of the State Board of Control of the liquor traffic, under the State Dispensary law, alleging that the state monopoly of the liquor business was in violation of the act. The court said that a state is not a "person" or "corporation" within the meaning of the section.

§ 482. Pleadings under section 7.—It is not sufficient to frame a complaint in the language of the statute, but the nature and substance of the contracts alleged to be illegal and the substantive facts constituting a monopoly, must be set out.

Cilley v. U. S. Machinery Co., 152 Fed. 726, C. C. Mass. (1907).

A complaint was also held bad on demurrer in *Rice v. Standard Oil Co.*, 134 Fed. 464 (Dist. N. J., 1905), where the court said that the plaintiff must not only show facts showing the combination to be unlawful, but also facts showing that by reason of such unlawful action he had been injured in his business or property; and that the act made a distinction between a contract and a combination or conspiracy, and the two should not be confused in a pleading in a civil case any more than in indictment in a criminal proceeding. As to complaint held sufficient for submission to a jury, see *Gibbs v. McNeeley*, *supra*.

The complaint in *Loewe v. Lawlor*, *supra* (the Danbury Hat Case), was held by the supreme court sufficient on demurrer to show a cause of action under this section charging interference

with the manufacturer's business by an unlawful combination in violation of the act.

§ 483. The Danbury Hat case.—In the case of *Loewe v. Lawlor* the petition was held good on demurrer by the supreme court, *supra*, § 92, and on trial in the circuit court plaintiff recovered judgment under the direction of court for \$74,000.00, which amount was trebled by the court under this section of the statute. The circuit court of appeals second circuit, 187 Fed. 522 (1911), reversed this judgment and held that the circuit court erred in withdrawing the question of liability from the jury when there was conflicting evidence as to the knowledge of defendants of the acts of the organizations; and the court said that the mere fact that a person was a member of the United Hatters Association, did not make him the principal of any and all agents who might be employed by its officers in carrying out its objects and responsible as principal if such agents used illegal methods or caused illegal methods to be used in undertaking to carry out such objects. The court held further that it was for the jury to determine from the entire body of proof that was the intent of the individuals who made up the combination or what they must have known to be the necessarily inevitable consequences of their acts; and also that it was erroneous to admit evidence of the payment of their dues to the unions by the individual defendants after the complaint was served; as such was not competent as showing ratification and should have been excluded. The testimony of plaintiff's salesmen, that customers told them of threats of boycott made by persons claiming to represent the defendant organizations, was held incompetent as hearsay.

The court said that there was no error in admitting the constitution of the association, or its action at its meetings, or its published lectures, or what it did with reference to the plaintiffs; but it said that all these matters were for the consideration of the jury to draw proper inferences therefrom. The cause was therefore, remanded for new trial.

§ 484 (343). Measure of damages under section 7.—The measure of damages which a party is entitled to recover in such an action is the difference between the price paid and the rea-

sonable price under natural and competitive conditions. See also *supra*, § 479.

The court said in the City of Atlanta case that the plain intent was to compensate the person injured and that the enlargement of compensation by the provision for trebling the amount of damages did not constitute the action a penal action within the meaning of section 1047 R. S., U. S. The other sections of the act were penal, but the 7th section was distinctly compensatory.

§ 485. The act as a defense in suits by alleged illegal combinations.—There is no provision in the Anti-Trust Act such as is contained in some state anti-trust statutes making the fact of membership of a vendor in an illegal combination a defense by a vendee in a suit for goods purchased; and where a contract of purchase is wholly collateral to and independent of the agreement under which the combination is made, the fact of the combination constitutes no defense in a suit for the purchase price by the vendor.

Connolly v. Sewer Pipe Co., 184 U. S. 540, 46 L. Ed. 679 (1902).

In this case it was held that the illegality of common law of a combination formed in restraint of trade did not prevent it from recovering the purchase price of goods sold in the course of business, and that a violation of the Anti-Trust Act by the formation of an illegal combination in restraint of trade did not preclude such a company from recovering on collateral contracts for the purchase price of goods, and also that a recovery of the treble damages under section 7 could only be had by direct action and not by way of set-off.

In *Continental Wall Paper Co. v. Voight*, 212 U. S. 227, 53 L. Ed. 486 (1909), the court, affirming 148 Fed. 930, sustained the defense set up by the answer in an action for goods sold and delivered that plaintiff was a selling agent of a combination of wall paper manufacturers offending against the act, and that in carrying out the combination defendants were compelled to sign a shipper's agreement which in effect bound them to buy from the plaintiff all wall paper needed in their business at certain fixed prices, and that these prices were unreasonable. Justices Holmes, Brewer, White and Peckham dissenting. The prevail-

ing opinion distinguished the case from the Connolly case, as there the contract of purchase was wholly collateral to and independent of the agreement under which the combination was made, while in this case, as admitted by the demurrer, the count sued on was made up in execution of the agreement and thus constituted a part of it.

The principle was also laid down in *Bement v. New York Harrow Co.*, 186 U. S. p. 70, 46 L. Ed. 1058 (1902), that the defense that a contract is in violation of an act of congress against unlawful restraints of monopolies making illegal every contract violative of its provisions may be set up by private individuals when sued thereon, and if proved constitutes a good defense to the action. In this case it was also held that conditions imposed by the patentee in a license which keep up the monopoly of fixed prices did not violate the act of congress. See *supra*, § 452. See also: *American Soda Fountain v. Green*, 69 Fed. 333 (C. C. E. D. of Pa., 1895); *Columbia Wire Co. v. Freeman Wire Co.*, 71 Fed. 302 (1895).

It is no objection to the enforcement of a contract, in the consideration of which nothing illegal inheres, that it may incidentally aid one of the parties in exacting and violating the Anti-Trust statute. This was held in *Ingraham v. Nat'l Salt Co.*, 130 Fed. 676 (1904, C. C. A. second circuit), reversing, 122 Fed. 40, where the action was to recover the amount of certificates created by defendant, in payment of stock of another company, the certificates in payment of the stock purchasing being held to have been lawfully issued in exercise of the defendant's implied power to incur indebtedness.

§ 486. No recovery under act for violation of interstate commerce act.—The anti-trust law does not give any right of action for damages sustained by the payment of excessive, unjust, or unreasonable rates to interstate carriers alleged to have been induced by a conspiracy between interstate railroads, as relief therefor as provided by the Interstate Commerce Act.

See *Meeker v. Lehigh Valley R. R. Co.*, 162 Fed. 354, circuit court, southern district New York (1908).

The Anti-Trust Act and the Interstate Commerce Act are separate and independent acts, not germane in character and purpose. See *United States v. A., T. & S. F. R. R. Co.*, 142 Fed. 176 (1905).

§ 487. Limitations.—There is no limitation fixed under this statute for the bringing of private actions. It was held by the supreme court, in the Atlanta case, that the limitation of five years in R. S. 1047 for suits upon penalty under the laws of the United States, did not apply, as an action under section 7 was not an action for penalty within the meaning of that statute. The matter of limitation was therefore left to the local law in which the action is brought by the silence of the statutes of the United States. Thus, in the City of Atlanta case the action was held to be controlled by the law of Tennessee; and under the construction of that statute by the courts of Tennessee the action was held to be controlled by the ten year statute of that state.

§ 488. Self incriminating testimony.—The subject of immunity of witnesses who give self-incriminating testimony, particularly in relation to governmental prosecutions, civil or criminal, under the other sections of this act, has been the subject of extensive discussion. Prior to the act of February 25, 1903, it had been held, in *Foote v. Buchanan*, 113 Fed. 156 (1902), that the act of congress of February 11, 1893, *supra*, p. 443, did not apply to the Anti-Trust Act, and that the fifth amendment of the constitution did apply thereto, so that self-incriminating testimony could not be enforced until this act of February 25, 1903, which was a provision of the legislative, executive and judicial appropriation act of that year (*supra*, § 347), providing that no person should be prosecuted and subjected to any penalty or forfeiture for or on account of any transaction matter or thing, concerning which he may testify or produce evidence, documentary or otherwise, in any preceding suit or prosecution under said acts. (The Interstate Commerce Act or the Anti-Trust Act). Provided further that no person so testifying shall be exempted from prosecution or punishment for perjury committed in so testifying.

By the act of June 30, 1906, it was provided that this immunity should extend only to a natural person who, in obedience to a subpoena, gives testimony on oath or gives testimony, documentary or otherwise, under oath. As to the construction of this Immunity Act in relation to corporations and natural persons, see *supra*, pp. 446 and 448.

SECTION 8.

§ 489. Section 8 of the act.

§ 489 (348). "Person" or "persons" defined.—SEC. 8. That the word "person," or "persons," wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any state, or the laws of any foreign country.

This statutory inclusion of the corporations and associations in the term "person" is not contained in the Interstate Commerce Act. The general rule however is well established that the term "person" as well as the term "citizen" is to be construed as including corporations unless there be something beyond the mere use of the word to indicate the intent on the part of congress to include them. *United States v. Amedy*, 11 Wheat. 329, 6 L. Ed. 502; *Ramsey v. Tacoma Land Co.*, 196 U. S. 360, 49 L. Ed. 513.

A municipal corporation is entitled to sue for damages under the 7th section by express direction of this section, see *supra*, § 479.

THE EXPEDITION ACT.

§ 490. The Expedition Act.

491. The judicial application of the act.

492. The amendment of 1910.

493. The construction of the statute.

§ 490. The Expedition Act.

AN ACT To expedite the hearing and determination of suits in equity pending or hereafter brought under the act of July second, eighteen hundred and ninety, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," "An Act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, or any other Acts having a like purpose that may be hereafter enacted.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, Sec. 1. (As amended June 25, 1910.) That in any suit in equity pending or

[Expedition of cases.]

hereafter brought in any circuit court of the United States under the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety, "An Act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, or any other Acts having a like purpose that hereafter may be enacted, wherein the United States is complainant, the Attorney-General may file with the clerk of such court a certificate that, in his opinion, the case is of general public importance, a copy of which shall be immediately furnished by such clerk to each of the circuit judges of the circuit in which the case is pending. Thereupon such case shall be given precedence over others and in every way expedited, and be assigned for hearing at the

[Hearing before three judges.]

earliest practicable day, before not less than three of the circuit judges of said court, if there be three or more; and if there be not more than two circuit judges, then before them and such district judge as they may select or, in case the full court shall not at any time be made up by reason of the necessary absence or disqualification of one or more of the said circuit judges, the justice of the Supreme Court assigned to that circuit or the other circuit judge or judges may designate a district judge or judges within the circuit who shall be competent to sit in said court at the hearing of said suit. In the event the judges sitting in such case shall be equally divided in opinion as to the decision

[Chief justice to designate circuit judge in case of equal division.]

or disposition of said cause, or in the event that a majority of said judges shall be unable to agree upon the judgment, order, or decree finally disposing of said case in said court which should be entered in said cause, then they shall immediately certify that fact to the Chief Justice of the United States, who shall at once designate and appoint some circuit judge to sit with said judges and to assist in determining said cause. Such order of the Chief Justice shall be immediately transmitted to the clerk of the circuit court in which said cause is pending, and shall be entered upon the minutes of said court. Thereupon said cause shall at once be set down for reargument and the parties thereto notified in writing by the clerk of said court of the action of the court and the date fixed for the reargument thereof. The provisions of this section shall apply to all causes and proceedings in all courts now pending, or which may hereafter be brought

[Appeal to supreme court.]

Sec. 2. That in every suit in equity pending or hereafter brought in any circuit court of the United States under any of said Acts, wherein the United States is complainant, including cases submitted but not yet decided, an appeal from the final decree of the circuit court will lie only to the Supreme Court and must be taken within sixty days from the entry thereof: *Provided*, That in any case where an appeal may have been taken from the final decree of a circuit court to the circuit court of appeals before this Act takes effect the case shall proceed to a final decree therein, and an appeal may be taken from such decree to the Supreme Court in the manner now provided by law.

Public, No. 82, approved February 11, 1903; Public, No. 310, approved June 25, 1910.

This Act, known as the "Expedition Act," was approved February 11, 1903, prior to the act amendatory of the Interstate Commerce Act, which was approved February 19, 1903, *supra*, § 422, and is therefore referred to in the third section of that act, where it is provided that the provisions of this act shall be applicable to any suit prosecuted under the direction of the attorney general in the name of the Interstate Commerce Commission.

§ 491 (350). **Judicial application of act.**—The summary procedure provided by this act was illustrated and enforced in the Northern Securities case, which was argued in the circuit court at St. Louis before the four judges of the court in April, 1903, decided in May, 1903, appealed to the supreme court, advanced

on the docket and finally decided on the fourth day of April, 1904.

In *Interstate Com. v. Baird*, 194 U. S. 25, 48 L. Ed. 860, decided April 4, 1904, which was appealed directly to the supreme court from the circuit court in a proceeding instituted by Mr. Hearst before the commission, the supreme court held that the appeal was properly made to the supreme court from the circuit court, and the right of direct appeal was also applicable to proceedings to enforce the production of books and papers or the giving of testimony before the commission. The court said it was the purpose of this act of 1903 to eliminate the necessity of any appeal in the circuit court of appeals and permit the litigation to be shortened by direct appeal to the supreme court.

In *Missouri Pacific Railroad Co. v. United States*, 189 U. S. 274, 47 L. Ed. 811, decided March 9, 1903, the supreme court while holding that the circuit court had erred in refusing to sustain a demurrer of a railroad company to a bill filed by the district attorney of the United States under the direction of the attorney-general, at the instance of the Interstate Commerce Commission, also said that the act of February, 1903, expressly conferred this power to invoke the remedy of injunction, which had not heretofore existed, and as that act specifically provided that the new remedies which it created should be applicable to all cases then pending, the court therefore decided that the case would not be finally disposed of, but would be remanded for further proceedings in accordance with the provisions of this act of Feb. 19, 1903.

§ 492. Amendment of 1910.—As originally enacted in 1903, section 1 of this act did not contain the provision for calling in a circuit judge from another circuit in case of an equal division of the court, but did provide that in case of a division in opinion the case should be certified to the supreme court for review in like manner as if taken there by appeal.

In *Baltimore & Ohio Railroad Co. v. Interstate Commerce Com.*, 215 U. S. 216, 54 L. Ed. 164 (1909), the court held that this provision did not authorize the sending up of the whole case, as that under the settled ruling of the court would convert the supreme court into one of original rather than appellate jurisdiction. The only construction the court, therefore, could

give to the statute under the constitution, would be to authorize the certification of questions when there was a division of opinion upon a definite point of law. The same ruling was made in the case of *U. S. v. Terminal R. R. Association of St. Louis*, wherein the entire case was certified to the supreme court on account of the equal division of the four judges sitting in the case. In consequence of this ruling the statute was amended in 1910 (act of June 25, 1910), by providing that when the judges were equally divided in opinion or a majority were unable to agree upon a judgment, they should certify that fact to the chief justice, who should designate some circuit judge to assist in determining the case.

§ 493. **Construction of the statute.**—This statute was construed by the judges of the fifth judicial circuit in *Southern Pacific T. Co. et al. v. Interstate Commerce Commission*, 166 Fed. 134 (1908), where it was sought to enjoin the enforcement of an order of the Interstate Commerce Commission and the court overruled a motion for an injunction pendente lite, one of the judges dissenting, the complainant moved the court at this stage to certify the case to the supreme court under section 2 of the act. The court said that section 16 of the Interstate Commerce Act as amended in 1906, made this expediting act apply to suits to suspend orders of the Interstate Commerce Commission, and required both the final hearing and the hearing for preliminary injunction to be held before three circuit judges; but there was no provision in the act requiring three circuit judges to sit in any other phases of the case than the hearing on application for preliminary injunction and on the final hearing: and the only provision for certification was in the case of a division of opinion, and there was no other provision for certification of the case in the statute, so that the motion was denied.

THE DEPARTMENT OF COMMERCE AND LABOR.

§ 494. The department of commerce and labor.

495. Section six of the act.

496. The remaining sections of the act.

§ 494 (351). The department of commerce and labor.—The department of labor was established by the Act of June 13, 1888. That department was placed under the jurisdiction and made part of the department of commerce and labor established by act of February 14, 1903, Sup. to Comp. Stat., page 41.

Section 1 provides for the establishment of the executive department and the secretary of commerce and labor; section 2 for an assistant secretary of commerce and labor, and other clerks; section 3 declares in general terms the province and duties of the department to foster, promote and develop the foreign and domestic commerce, the manufacture, mining, shipping and fishery industries, the labor interests and the transportation facilities of the United States, and certain appropriations are made applicable therefor; section 4 provides for the transfer of certain existing offices, etc., from the treasury and interior departments to this department, including the lighthouse establishment, steamboat inspection service, bureau of navigation, the bureau of immigration, the bureau of statistics from the treasury, and the census office from the department of the interior; section 5 establishes a bureau of manufactures making it the province and duty of the bureau to foster and develop the various manufacturing interests of the United States and markets for the same at home and abroad, domestic and foreign, by gathering, compiling and supplying all useful information concerning such markets. Consular reports are provided for. Section 6 of the act providing for a bureau of corporations is set out in full:

§ 495 (352). Bureau of Corporations—Commissioner, Deputy, etc.—SEC. 6. That there shall be in the Department of Commerce and Labor a bureau to be called the Bureau of Corporations, and a Commissioner of Corporations, who shall be the head of said bureau, to be appointed by the President, who shall receive a salary of five thousand dollars per annum.

There shall also be in said bureau a deputy commissioner, who shall receive a salary of three thousand five hundred dollars per annum, and who shall, in the absence of the Commissioner, act as and perform the duties of the Commissioner of Corporations, and who shall perform such other duties as may be assigned to him by the Secretary of Commerce and Labor or by the said Commissioner. There shall also be in the said bureau a chief clerk and such special agents, clerks, and other employees as may be authorized by law.

The said Commissioner shall have power and authority to make, under the direction and control of the Secretary of Commerce and Labor, diligent investigation into the organization, conduct, and management of the business of any corporation, joint stock company, or corporate combination engaged in the commerce among the several States and with foreign nations, excepting common carriers subject to "An Act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, and to gather such information and data as will enable the President of the United States to make recommendations to Congress for legislation for the regulation of such commerce, and to report such data to the President from time to time as he shall require; and the information so obtained or as much thereof as the President may direct, shall be made public.

In order to accomplish the purposes declared in the foregoing part of this section, the said Commissioner shall have and exercise the same power and authority in respect to corporations, joint stock companies, and combinations subject to the provisions hereof, as is conferred on the Interstate Commerce Commission in said "Act to regulate commerce" and the amendments thereto, in respect to common carriers so far as the same may be applicable, including the right to subpoena and compel the attendance and testimony of witnesses and the production of documentary evidence and to administer oaths. All the requirements, obligations, liabilities, and immunities imposed or conferred by said "Act to regulate commerce" and by "An Act in relation to testimony before the Interstate Commerce Commission," and so forth, approved February eleventh, eighteen hundred and ninety-three, supplemental to said "Act to regulate commerce," shall also apply to all persons who may be subpoenaed to testify as witnesses or to produce documentary evidence in pursuance of the authority conferred by this section.

It shall also be the province and duty of said Bureau, under the direction of the Secretary of Commerce and Labor, to gather, compile, publish, and supply useful information concerning corporations doing business within the limits of the United States and shall engage in interstate commerce or in

commerce between the United States and any foreign country, including corporations engaged in insurance, and to attend to such other duties as may be hereafter provided by law.

§ 496 (353). The remaining sections of the act.—Section 7 deals with the control of the fur-seal and other Alaskan fisheries, the immigration of aliens; section 8 with the annual reports to congress and special investigations and reports; section 9 with the custody of the department buildings, property, records, etc. Section 10 with the transfer of duties and powers of heads of executive departments, and their duties, powers, etc., for the secretary of the treasury, seamen, shipping, etc. Section 11 provides for the co-operation of the state department in the matter of consular reports. Section 12 provides for the transfer to this department of offices, bureaus, etc., engaged in scientific work to this department. The remaining sections of the act dealt with the time of taking effect of the transfers provided for and for the administrative details in the matter of appropriations, transfer of officers, clerks, etc., and the occupation of buildings. See *supra*, § 59.

THE SAFETY ACT OF 1893, AMENDED 1896.

SECTION 1.

§ 497. Section 1 of the act.

498. Railroads subject to the act.

499. The common law duty of the carrier in relation to safety appliances.

500. Petition and procedure under the act.

501. Federal question in suits under the act.

502. The act in the state courts.

AN ACT To promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes.

§ 497 (354). Driving-wheel and train brakes. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:* Sec. 1. That from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose.

§ 498 (355). Railroads subject to the act.—This act, as also the Accident law, is made applicable to any common carrier engaged in interstate commerce by railroad, while the Interstate Commerce Act applies only to the interstate traffic of railroad carriers, except in the requirement of annual reports under section 20 of that act. In *United States v. Geddes*, 131 Fed. 452 (1904), C. C. A., sixth circuit, which was a suit on behalf of the United States for the recovery of penalties under this act, the court held that a narrow gauge railroad wholly in Ohio which connected at one of its termini with an interstate road but neither shipped nor received any traffic under a through bill of lading, or any other arrangement, and charged local

freight tariffs on its own line, assuming payment of the Baltimore & Ohio advance charges with weekly settlements was not engaged in interstate commerce within the meaning of this act and was therefore not subject to penalties for non-compliance. The court said that under the rulings of the supreme court, express and sleeping car and railroad companies were limited to the nature of their business, making it local or interstate or both as they pleased, and that assuming the payment of the charges of the delivering road did not constitute a continuous carriage necessary to make the business of interstate commerce. See also 180 Fed. 480.

But a stock yards company owning and maintaining a live stock depot of all railroad companies doing business at that point, and owning and maintaining several miles of track connecting with several railroad companies, and which by its own locomotives and servants transports for hire over its tracks shipments accepted by other railroad companies, is a common carrier within the meaning of the Safety Appliance law, although the cars in which it transports such shipments are in every instance the cars of the other companies, and although the stockyards company receives its compensation from the railroads and not the shippers. *Union Stockyards Co. v. U. S.*, 169 Fed. 404 (1909), C. C. A., eighth circuit, affirming 161 Fed. 919.

The same decision was made in the circuit court of the seventh circuit as to the belt railroad in Cook county, Illinois, forming connections with trunk lines and acting only as an agent for the trunk line, see 168 Fed. 542 (1909), to move a train of freight cars containing one from a point on one railroad in Illinois to a point on another railroad in Wisconsin. Such a transfer constituted in effect a continuous carriage over both the roads and defendant was therefore engaged in interstate commerce and within the Safety Appliance Act.

In *U. S. v. Southern Railway*, 164 Fed. 347, district court of Alabama (1908), the act was broadly held to apply to all vehicles running on interstate highway, and that it was immaterial that the cars were loaded with commodities from one point to another in the same state, and that it was sufficient that the cars were hauled over a portion of the interstate highway.

It was also held in the circuit court of appeals of the ninth circuit, *Pacific Coast Ry. Co. v. U. S.*, 173 Fed. 448 (1909),

that the act applies to a railroad which takes part in the transportation of interstate commerce on any point of its way to the point of final destination, though operated wholly within a single state, independently of connecting lines and without any traffic arrangement. See also *U. S. v. Colorado, etc., Co.*, 157 Fed. 321, C. C., eighth circuit (1907), where the same ruling is made as to the transportation for an independent express company by railroad operating entirely within the state if the articles carried are for continuous passage to or from places out of the state; and it is immaterial that the property is carried free or from a common control of management or arrangement with another carrier.

See also *U. S. v. International, etc., Co.*, 174 Fed. 638 (1909), circuit court of appeals of the fifth circuit.

§ 499 (356). The common law duty of the carrier in relation to safety appliances.—It was held by the supreme court of North Carolina that the action of the Interstate Commerce Commission in extending the date at which the act should go into force could not set aside the principle of law that failure to provide the appliances was negligence *per se*, and that such postponement could not have any other effect than to postpone the date at which the use would impose the penalty for failure to do so. In other words, that the court would take notice of the act as establishing by legislative recognition a measure of legal duty of the railroad company in providing safe appliances, that is, modern self-coupling devices, for its employees. *Troxler v. Southern Ry. Co.*, 122 N. C. 902, 44 L. R. A. 313 (1899). See also *Greenlee v. Southern Railway Co.*, 122 N. C. 982, 41 L. R. A. 99 (1899).

In *Schlemmer v. R. R. Co.*, 207 Pa. 198 (1907), the court intimated that it was doubtful whether the act had any applicability to actions for negligence in Pennsylvania, but did not decide this point as the plaintiff was non-suited for contributory negligence. This judgment, however, was reversed by the supreme court of the United States, 205 U. S. 1, 51 L. Ed. 681, on the ground that this ruling of the state court was inconsistent with the provision of section 8 of the act as to non-assumption of risk.

In *New England Railroad Co. v. Conroy*, 175 U. S. 323, 44 L. Ed. 181 (1899), a case not arising under the act, but involv-

ing the question of the responsibility of the engineer, the court said that as railroads are now operated, the engineer is a much more important functionary in the actual movements of the train than the conductor, and particularly has this become the case since the introduction of the air brake train system, and the court referred to the first section of this act of March 2, 1893, providing for air brakes under the control of the engineer, saying: "We do not refer to this statute as directly applicable to the case in hand, but as a legislative recognition of the dominant position of the engineer." See also *Northern Pacific R. R. Co. v. Tynan*, 56 C. C. A. 192, 119 Fed. 288 (1902), where the court says that prior to the passage of this act there had been numerous decisions rendered by the courts of this country, where it was held that the railroad companies were guilty of negligence in using the Miller coupler in connection with the ordinary link draw bars. See also *Texas & Pacific R. Co. v. Archibald*, 170 U. S. 665, 42 L. Ed. 1188 (1898).

§ 500 (357). Petition and procedure under the act.—Held in *Voelker v. R. R. Co.*, 116 Fed. 867 (1902), and affirmed on this point by the court of appeals, that it is not necessary for the petition for personal injuries suffered under violation of the act to refer to the act, although the burden is on the plaintiff to show that the car on which he was injured was engaged in interstate commerce, *Winkler v. Pennsylvania R. Co.* (Del.), 53 Atl. 90; and it is a question for the jury whether railroad companies comply with the act. *Crawford v. Railroad Co.*, 10 Am Negligence Reps. 166.

§ 501 (358). Federal question in suits under the act.—The instruction by a court to a jury that railroads are required to keep their appliances in good and suitable order, raised no question under the act so as to make a claim of a federal right under section 709, R. S., which can be the basis of a writ of error from the supreme court to the highest court of the state. *Southern Ry. Co. v. Carson*, 194 U. S. 136, 48 L. Ed. 907 (1904). It was objected in this case that the instructions in the state court assumed that if the automatic coupling was out of order the company failed to comply with the act of congress, and the supreme court of the state held that there was no error in this, as congress must have intended that the couplers should have been

kept in proper repair for use, and moreover as such was the law of the state, even if the act of congress had not specifically imposed this duty. The court said that in this ruling no right was specifically set up or claimed under the act of congress, and the writ of error was dismissed.

§ 502. The act in the state courts.—As there is no exclusive jurisdiction vested by the act in the federal courts its effect is to create a new standard of duty and liability in interstate commerce, which is the law of the land both as to the federal and state courts. This was illustrated in the Schlemmer Case, *supra*, wherein the supreme court of Pennsylvania held that the plaintiff was barred from recovering by reason of his own contributory negligence, which was reversed by the supreme court of the United States on the ground that this ruling, which was in conformity with that enforced in the courts of the state in actions for personal injuries, was inconsistent with the rule of non-assumption of risk which was declared by the Safety Act and was applicable to the interstate employment wherein plaintiff was engaged. As this federal right was duly asserted in the case and denied a federal question was presented and the judgment of the state court was reviewable by the supreme court. See same case, second appeal, *infra*, § 523.

SECTION 2.

§ 503. Section 2 of the act.

504. Coupler equipment under section 2.

505. Automatic couplers of different makes.

506. The meaning of "car" in section 2.

507. An absolute duty imposed upon carriers by the act to provide and maintain automatic equipment.

508. When cars are in interstate commerce.

§ 503 (359). Automatic couplers.—SEC. 2. That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of cars.

§ 504 (360). Coupler equipment under section 2.—The requirement of automatic couplers in section 2 was construed by the circuit court of appeals for the eighth circuit in Chicago, *Milwaukee & St. Paul R. Co. v. Voelker*, 129 Fed. 522, reversing 116 Fed. 867, decided March, 1904. The court said that the act of congress forbade the use of a coupler which required the operator to go between the ends of the cars to prepare the coupler for the impact. The preparation of the coupler for the impact is not distinct from the act of coupling. Both are connected with the indispensable parts of the larger act, which is regulated by the statute and the performance of which is intended to be released from unnecessary risk and danger. The court ruled that when an automatic car coupler had been permitted to become worn and defective so the lever would not lift the pin from the socket, and the knuckle could not be drawn open by leaning toward the coupler and using one hand, but required the presence of the operator's entire body between the ends of the cars and the draw bars and the use of both his hands, it failed to meet the requirements of the act and constituted actionable negligence.

It was held in *Briggs v. C., N. & W. R. Co.*, 125 Fed. 745 (1903), that when a railroad company in order to comply with section 2 of the act removed the long pilot from in front of the

engine and substituted a shorter one in order to put the automatic coupler in front of the engine, an accident which could have been prevented by a long pilot does not make the company liable.

§ 505 (361). Automatic couplers of different makes.—The amendment of 1903 provides that the act shall apply in all cases whether or not the couplers brought together are the same kind, make or title, and the provisions and requirements relating to train brakes, automatic couplers, grab irons and the height of draw bars apply to all trains, locomotive tenders and cars, and similar vehicles used on any railroad in interstate commerce and saving those excepted by the act.

In a suit brought prior to the amendment of 1903 it was held by the supreme court in *Johnson v. Southern Pacific R. Co.*, 196 U. S. 1, 49 L. Ed. 363 (1904), reversing the circuit court of the eighth circuit in 117 Fed. 462, that the couplers required must be of such a nature and character that they must couple automatically and save the employes from going between the cars, and that the use of automatic couplers which did not couple automatically on the same train whether of the same make or not violated the act.

As stated above however this requirement is now enforced by the amended statute of 1903.

§ 503 (362). The meaning of "car" in section 2.—In the same case the term "car" as used in section 2, which was held by a majority of the court of appeals, Thayer, J., dissenting, not to include locomotives, and that there was no language in the act which would make it unlawful to use in interstate commerce locomotive engines which were not equipped with automatic couplers. This ruling was reversed by the supreme court which held that the law must be construed with reference to the danger to employes which it sought to remedy, and that for the purposes of safety appliances, locomotives were *cars* within the meaning of the act and are required to be equipped with automatic couplers, and that it was even more necessary that locomotives should be so equipped than it was that freight, dining and passenger cars should be, since locomotives had occasion to make couplings more frequently. The word car was therefore used in a generic sense as including both the locomotive and its tender.

In the *Schlemmer Case*, *supra*, the court reaffirmed the ruling of the *Johnson Case* and said that a shovel car attached to an

interstate train was within the meaning of the statute as well as the locomotive, and that the words, "used in moving interstate traffic," should not be taken in a narrow sense; and the supreme court of Pennsylvania was held to have erred in holding that such a car was not within the meaning of the section. The court said the amendatory act of March 2, 1903, indicated the intent of the original act.

§ 507. An absolute duty imposed upon carriers by the act to provide and maintain automatic equipment.—An absolute duty to provide a car used in moving interstate traffic with automatic couplers and to maintain them in proper condition at all times and in all conditions is imposed upon interstate carriers by this act, which is not discharged by properly equipping the car with automatic couplers and using due diligence to keep them in good working order. This rule of absolute duty was definitely declared by the supreme court in a prosecution by the government for penalty for non-compliance with the act under section 6 of the act, *C. B. & Q. R. Co. v. U. S.*, 220 U. S. 612, 55 L. Ed. — (June, 1911), and also in private actions by employes for personal injuries sustained through the absence of defective conditions of the automatic couplers required by the act. *St. L., I. & M. R. Co. v. Taylor*, 210 U. S. 281, 52 L. Ed. 1061 (1909), and also in *Delk v. St. L. & St. F. R. Co.*, 220 U. S. 617, 55 L. Ed. — (June, 1911). In the latter case the court reversed the judgment of the circuit court of appeals of the sixth circuit, 158 Fed. 931. The court said in the latter case that this absolute duty not only required the carrier to provide the automatic couplers, the kind prescribed by congress, but also an absolute duty to keep the cars in good order at all times. In this case the car had a defective coupler and the company had sent for the required appliances and would repair the car when it was received, but the court said the company could only use the car in this defective condition under the penalty of the law, and as the injury was suffered by the employe in attempting to force a coupling in this defective condition the company was liable.

In this *Delk Case* the trial court had submitted the issue of contributory negligence to the jury which rendered a verdict for plaintiff. This was reversed by the circuit court of appeals and the case taken to the supreme court by writ of certiorari. The supreme court reversed the judgment of the circuit court of appeals and affirmed the judgment of the circuit court.

§ 508 (363). When cars are in interstate commerce.—Another important ruling was made in the Johnson case. The injury in this case was caused in coupling a freight engine with a dining car which had been detached from a through train, turned on the turn-table and was to be drawn by a freight engine to the turn-table, turned, and then moved to a side track to wait another through train moving in the opposite direction. As the car was standing empty on the side track when the plaintiff was injured, the majority of the court held that it was not engaged in interstate commerce, and therefore at the time of the accident the locomotive and dining car were not being used in moving interstate traffic within the meaning of the act. The supreme court in the case cited, and in the same opinion, reversed this decision, and held that the dining car, though empty and on a side track, was engaged in interstate commerce within the meaning of the act.

In the Delk Case, *supra*, it was held by the supreme court that a freight car, loaded with interstate freight and placed on a side track in the railway yard at destination to await repairs to the automatic coupler, was used in moving interstate commerce within the meaning of the act when a coupling with another car is thereafter attempted by the carrier's order during the course of switching operations.

Thus, it is immaterial whether the car is full or empty. See *Johnston v. Great Northern Railway Co.*, 178 Fed. 643, circuit court of appeals, eighth circuit (1910). In this case the cars were awaiting delivery on the switch track, and the company was held liable. See *U. S. v. L. & N. R. R. Co.*, 186 Fed. 280, C. C. A., sixth circuit.

In *Southern Railway Co. v. Snyder*, 187 Fed. 492, sixth circuit (1911), the court held that cars being hauled to a place of repair in an intrastate train composed only of such cars, or while on a repair track out of all connection with cars in commercial use, were not subject to the act, and that while a railroad could move empty cars by themselves to repair shops, yet in so moving them the cars must be wholly excluded from commercial use and from connection with other vehicles which were commercially used. The court, however, emphasized the duty of the carrier to exercise a high degree of diligence in discovering and repairing the defect in the coupler and withdrawing the car from commercial use while the defect existed.

The court held that it was a question for the jury whether the cars had been in fact withdrawn from commercial interstate use at the time of the injury to plaintiff.

In *U. S. v. C. & N. W. R. Co.*, 157 Fed. 616, district court of Nebraska, it was held that under this act as amended in March, 1903, there was no room for distinction in a car actually engaged in interstate commerce and the hauling of one that is generally used therein, and that the hauling of an empty car from one state to another for purposes of repair was engaging in interstate commerce, and that an engine was a car within the meaning of the act. See also *Wabash v. U. S.*, 168 Fed. 1, C. C. A., seventh circuit (1909), where the same ruling was made. In this case the court construed the word "used" as applying to all cars and trains operated over an interstate highway, whether they were operated between points in the same states or whether they were empty, or whether the traffic carried is interstate traffic or not. See also *U. S. v. St. Louis, etc., Co.*, district court of Tennessee, 154 Fed. 516 (1906).

In *Erie R. Co. v. Russell*, 183 Fed. 722, the circuit court of appeals, second circuit (Dec., 1910), held that a car with a defective coupler billed for the repair shop which was not sent there but was left on the track in ordinary use on the switching track to be repaired by the switchmen, and that car coupled to other cars were being "used" within the meaning of the statute; and where such a car, though empty, was brought into the station in an interstate train it was being used in interstate commerce, not only while being moved in the train but also while being repaired in the yards. In an action to recover for death of a switchman killed in repairing the defective coupler, the question of whether the defective coupler was the proximate cause of his death was held properly submitted to the jury, as was also the question of contributory negligence, and the judgment for plaintiff was affirmed.

In *Southern Ry. Co. v. U. S.*, decided Nov. 1911, it was held by the supreme court that the law applies to all equipment on a highway of interstate commerce, whether at the time the car is carrying state or interstate commerce, and that the act so construed was within the constitutional power of congress. See also *U. S. v. Western & A. R. R. Co.*, 184 Fed. 336 (1910), Dist. Ct. N. D. of Georgia.

SECTION 3.

§ 509. Section 3 of the act.

510. The use of defective cars forbidden.

§ 509 (364). When carriers may refuse to receive cars.—
SEC. 3. That when any person, firm, company, or corporation engaged in interstate commerce by railroad shall have equipped a sufficient number of its cars so as to comply with the provisions of section one of this act, it may lawfully refuse to receive from connecting lines of road or shippers any cars not equipped sufficiently, in accordance with the first section of this act, with such power or train brakes as will work and readily interchange with the brakes in use on its own cars, as required by this act.

§ 510 (366). The use of defective cars forbidden.—The prohibition of the statute is against the use, and not against the ownership of a car, defective in its required equipment. There is no right of recovery by a terminal railroad, which has been mulcted in damages in a suit by an employe for injuries sustained in handling a car, wanting in equipment, from the carrier company owning the car; as it was its duty to refuse to receive the defective car; and therefore it was so far a wrong doer that it could not recover over from the owning company. *Union Stockyards of Omaha v. C. B. & Q. R. R. Co.*, 196 U. S. 217, 49 L. Ed. 453 (1905). This case did not arise under the Safety Act, but was decided under the common law principles, with reference to the duty of the carrier and the right of contribution in case of damages for neglect of duty.

SECTION 4.

§ 511. Section 4 of the act.

512. Construction of section.

§ 511 (365). Grab irons and handholds.—SEC. 4. That from and after the first day of July, eighteen hundred and ninety-five, until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars.

§ 512. Construction of section.—In *U. S. v. B. & O. R. R. Co.*, district court, W. D. of Virginia, November, 1910, 184 Fed. 94, the court held that this section was indefinite as to the number of handholds and as to the intended location thereof on the ends and sides of cars. It was not indefinite so far as it required handholds to be provided both on the ends and sides of cars, and that a yard engine used in interstate commerce was not equipped as required where no handholds were provided in the sides near the rear end of the tender, though the tender was equipped with a running board and an uncoupling level bar which ran nearly across the entire back of the tender and was so located and of such a character that it might serve as a handhold; it not appearing that the presence of the handhold as required would not tend to greater security.

SECTION 5.

§ 513. Section 5 of the act.

514. The delegation of power sustained.

§ 513 (367). Standard height of drawbars for freight cars.—
 SEC. 5. That within ninety days from the passage of this act the American Railway Association is authorized hereby to designate to the Interstate Commerce Commission the standard height of drawbars for freight cars, measured perpendicular from the level of the tops of the rails to the centers of the drawbars, for each of the several gauges of railroads in use in the United States, and shall fix a maximum variation from such standard height to be allowed between the drawbars of empty and loaded cars. Upon their determination being certified to the Interstate Commerce Commission, said Commission shall at once give notice of the standard fixed upon to all common carriers, owners, or lessees engaged in interstate commerce in the United States by such means as the Commission may deem proper. But should said association fail to determine a standard as above provided, it shall be the duty of the Interstate Commerce Commission to do so, before July first, eighteen hundred and ninety-four, and immediately to give notice thereof as aforesaid. And after July first, eighteen hundred and ninety-five, no cars, either loaded or unloaded, shall be use in interstate traffic which do not comply with the standard above provided for.*

§ 514. The delegation of power sustained.—Legislative power is not unconstitutionally delegated to the American Railway Association and the Interstate Commerce Association by this section. *St. Louis, I. M. & S. R. Co. v. Taylor*, 210 U. S. 281, 52 L. Ed. 1061 (1907). The court said that whether or not legislative power was unconstitutionally delegated was a federal question which allowed a writ of error from the supreme court to the supreme court of Arkansas; but the court found that the legislative power was not unconstitutionally delegated, and that the state court erred in holding that under the section the drawbars of unloaded freight cars are required to be of uniform and standard height, but those of loaded cars need not be of a uni-

* Note.—Prescribed standard height of drawbars: Standard-gauge roads, 34½ inches; narrow-gauge roads, 26 inches; maximum variation between loaded and empty cars, 3 inches.

form height, provided that they did not vary from the three inches prescribed as the maximum permitting variation from the standard. The court also held that the statutory duty imposed upon the carriers in absolute terms by this section, of using in interstate commerce only such freight cars as comply with the standard fixed as the height for draw bars, is not discharged by furnishing cars constructed with draw bars of the standard height and by furnishing to competent inspectors and trainmen a sufficient number of metallic wedges or "shins" to use as occasion demands to raise to the legal standard draw bars lowered by the natural effect of proper use, reversing 83 Ark. 591.

SECTION 6.

§ 515. Section 6 of the act.

516. Enforcement of act by prosecution.

517. The supreme court on prosecution for penalty under the act.

518. The burden of proof under the proviso.

§ 515 (368). **Penalty for the violation of the provisions of this act.—SEC. 6.** (*As amended April 1, 1896*). That any such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States district attorney in the District Court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such district attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred; and it shall also be the duty of the Interstate Commerce Commission to lodge with the proper district attorneys information of any such violations as may come to its knowledge: *Provided*, That nothing in this act contained shall apply to trains composed of four-wheel cars or to trains composed of eight-wheel standard logging cars where the height of such car from top of rail to center of coupling does not exceed twenty-five inches, or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs.

§ 516 (369). **Enforcement of the act by prosecution.—**This act has been applied and enforced not only in suits for damages against the railroad companies for alleged non-compliance with the act, but also in suits by the government under this section. An action by the government under this statute to recover this penalty has been held not to be a criminal prosecution, but a civil action. See *U. S. v. Oregon State Line R. R. Co.*, 180 Fed. 483, Dist. of Idaho (1908). In this case it was held that it was not necessary to allege that the company acted knowingly or negligently, as the penalty was enforced for the non-compliance with the statutory duty. See also *U. S. v. P. & Reading R. R.*, 160 Fed. 696 (1908).

It was held by the circuit court of appeals, fifth circuit, in *St. Louis Southwestern Ry. Co. v U. S.*, 184 Fed. 28 (January, 1910), that where several cars, each without the requisite appliances required by this act, are hauled by a carrier in interstate commerce at one and the same time, there are as many distinct

violations of the act as there are cars not properly equipped, for every one of which the statutory penalty is recoverable. It was also held that actions to recover these statutory penalties are so far civil in their nature that the United States may recover upon the preponderance of evidence, and the trial judge may in proper cases direct a verdict.

See also *U. S. v. Western & A. R. Co.*, 184 Fed. 336, district court, northern district of Georgia, where the court passed upon the sufficiency of a declaration to recover penalties for violation of the act. It was held that it was sufficient that a car not properly equipped is moved in a train containing cars carrying interstate commerce, though the defective car was not immediately connected to that carrying the interstate shipment; and the declaration was held sufficient which showed that the car had not arrived at its point of final destination.

§ 517. The supreme court on prosecution for penalty under the act.—In *C. B. & Q. R. Co. v. U. S.*, *supra*, the supreme court affirmed the judgment of the circuit court eighth circuit, 170 Fed. 556, wherein judgment had been affirmed in favor of the United States in a suit to recover penalties for violation of the Safety Appliance Act. It was claimed that the ruling in the Taylor Case, *supra*, was not applicable as that was an action by an individual to recover damages for a personal injury, whereas the present action was to recover a penalty; but the court said the contention was unsound as the action for recovery of penalty was a civil one. It was therefore competent for the trial court to withdraw the case from a jury and direct a verdict if the evidence was uncontradicted and raised only a question of law. The penalty could not be escaped by showing that the carrier had exercised reasonable care in equipping its cars with required safety appliances and had used due diligence to keep them in repair by usual inspection; but the statute imposed an absolute duty upon the carrier which was not discharged by the exercise of reasonable care or diligence.

§ 518. The burden of proof under the proviso.—The burden of proof is upon a railroad to bring itself within this exception in favor of four wheel cars. The effect of the proviso is to create an exception; and whoever claims under such an exception must set it up and prove it through this case. *Schlemmer v. R. R.*, *supra*, § 502.

SECTION 7.

§ 519. Section 7 of the act.

520. Discretion of the commission in delaying enforcement of the act.

§ 519 (370). Power to extend time.—SEC. 7. That the Interstate Commerce Commission may from time to time upon full hearing and for good cause extend the period within which any common carrier shall comply with the provisions of this act.

§ 520 (371). Discretion of the commission in delaying the enforcement of the act.—This statute, which as amended is the only enactment for the safety of railroad employees in the federal regulation of railroad transportation, has been construed by the commission from time to time in connection with the discretionary power lodged with the commission under section 7 of the act for the extension of the period of time in which the railroads are required to comply with the act. The commission has ruled that this discretionary power was designed to afford relief in cases which would otherwise inflict special hardships upon the public and the carriers and should only be exercised under such circumstances and for such short lengths of time as are contemplated by the framers of the statute and are plainly inferable from its terms. 9 I. C. C. R. 522; 8 I. C. C. R. 643, 662; 6 I. C. C. R. 332.

SECTION 8.

§ 521. Section 8 of the act.

522. Contributory negligence under the act.

523. Contributory negligence distinguished from assumption of risk.

524. Responsibility of carrier for cars out of condition.

§ 521 (372). **Employees not deemed to assume risk of employment.**—SEC. 8. That any employee of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provision of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge.

§ 522 (373). **Contributory negligence under the act.**—It is provided in section 8 of the original act that the continuance in the employment of the carrier by an employe after knowing of the violation of the act shall not be deemed an assumption of the risk. It has been held in some of the state courts that this provision clearly indicates the modification of the terms and limiting the applications theretofore announced by the courts with reference to the assumption of the risk by the employe. See *Texas, etc., R. Co. v. Swearingen*, 122 Fed. 193 (1903). See also *Narramore v. Railroad Co.*, 96 Fed. 298, C. C. A., sixth circuit (1899), construing the Ohio statute to the same effect.

But it was held by the United States circuit court of appeals for the eighth circuit in *Gilbert v. Burlington C. R. & N. R. Co.*, 128 Fed. 529 (1904), *afg.* 123 Fed. 832, that the devolution of the duty upon the common carriers to so equip their cars, that they could be uncoupled without requiring their servants to go between the ends of the cars, necessarily imposed upon their servants the railroad's duty of using the equipment thus used upon them, and refraining from going between the ends of the cars to couple or uncouple them unless compelled to do so by necessity. Under this legislation the breach of either of these duties constituted a want of ordinary care and constituted actionable negligence. The court also said the principle was applicable, that where there is a comparatively safe and a more dangerous way of discharging the duty known to the servants, it was negligence for him to select the more dangerous method, and if his negli-

gence contributed to his injury, his negligence is fatal to recovery therefore. See also *Northern Pacific Ry. Co. v. Tynan*, 119 Fed. 288, and 56 C. C. A. 192, ninth circuit, 1902, where the court left the issue of contributory negligence to the jury. See also *Railway Co. v. Baker*, 33 C. C. A. 468, 91 Fed. 224, in the seventh circuit, where plaintiff was held guilty of contributory negligence for failing to exercise reasonable care for his own safety in the absence of grab irons or hand holds; and *Denver & Rio Grande R. Co. v. Arrighi*, 129 Fed. 347 (C. C. A., eighth circuit). In this case the court said that the defense of contributory negligence was as available to the railroad company after as before the passage of the act of congress, although it had not complied with its requirements. In this case the plaintiff rested his case entirely on the failure of the defendant to comply with the act. The court said that the rationale of the doctrine of assumption of risk was not that which supported the rule of contributory negligence.

It was held in the *Voelker Case*, *supra*, that a switchman does not assume the risk where the car requiring couplers is not so equipped, and is not marked or isolated as one in bad repair, and its movement at the time is not with the view to its isolation or repair, though he continues in the employment with knowledge of the unlawful use of the car.

It was ruled by the supreme court in the *Taylor Case*, *supra*, that the Safety Appliance Act imposed upon the railroad companies an unqualified and absolute duty, and that they move cars in a defective condition at their peril. This same ruling has been followed in suits for damages by or on behalf of employes in *Atlantic Coast Line v. U. S.*, 168 Fed. 175, by the circuit court of appeals of the fourth circuit; in *Wabash R. R. v. U. S.*, circuit court of appeals, seventh circuit, *supra*; by the circuit court of appeals, eighth circuit, in *U. S. v. Southern Pacific*, 169 Fed. 407 (1909); in *C., B. & Q. R. R. v. U. S.*, 170 Fed. 556, and by the sixth circuit in *U. S. v. Illinois Central R. R.*, 177 Fed. 801. It therefore follows that the employe cannot be charged with assuming the risk when the company fails in the performance of this statutory duty. See also *Employer's Liability Act of 1908*, p. 514, *infra*. See also *U. S. v. Anderson Tobacco, etc., Co.*, 163 Fed. 517, C. C. A. eighth circuit (1908), reversing 150 Fed. 442.

§ 523. Contributory negligence distinguished from assumption of risk.—The Schlemmer Case, *supra*, came again before the supreme court, 220 U. S. 590, 55 L. Ed. — (1911), on a writ of error from a second trial where judgment was rendered for the defendant, affirmed by the supreme court of Pennsylvania, 220 Pa. 470. The supreme court affirmed the judgment of the Pennsylvania court, which in turn had affirmed the judgment of the trial court, which had entered a judgment for the defendant, notwithstanding a verdict of the jury for the plaintiff on the issue of contributory negligence. This was on the ground that a clear cause of contributory negligence was presented in that the decedent not only attempted to make the coupling in a dangerous way when his attention was directly called to a safe way, but also did it with reckless disregard of his personal safety by raising his head, though twice expressly cautioned at the time as to the danger of so doing.

The supreme court said that the statute at the time of the injury complained of took away the defense of assumption of risk but did not deal with the defense of contributory negligence, and that while assumption of risk sometimes shades into negligence as commonly understood there is, nevertheless, the practical and clear distinction between the two. Assumption of risk means that an employe is held to assume the risk of the ordinary dangers of the occupation into which he is about to enter, and those risks and dangers which are known or are so plainly observable that the employe may be presumed to know of them; and if he continues in the master's employ without objection he takes upon himself the risk of injury from his defects. Contributory negligence, on the other hand, is the omission of the employe to take those precautions for his own safety which ordinary prudence requires. Under the statute, therefore, when Schlemmer saw that the car was not equipped with an automatic coupler he would not from that knowledge alone take upon himself the risk of injury without liability from his employer; but he was not for that reason absolved from the duty of using ordinary care for his own protection under the circumstances as they existed. No federal right, therefore, was denied in the ruling of the state court, directing a judgment for the defendant.

In this case the court called attention to the third section of the Employer's Liability Act of 1908, which was enacted after

the injury in this case, which provided that no employe was guilty of contributory negligence in any case where violation by a common carrier of any statute enacted for the safety of employes, contributed to the injury or death of such employes. See *infra*.

§ 524. Responsibility of carrier for cars out of condition— Prior to the decision of the supreme court in the Delk Case there was a difference of judicial opinion as expressed in the circuit courts as to the responsibility of the carrier when a car equipped with automatic apparatus is out of order, and is being used for switching purposes on a side track where it is placed for repairs. See *Sigel v. N. Y. C. & H. R. Co.*, N. D. of Pa., 178 Fed. 873 (1910), and also the opinion of the majority of the court of appeals of the sixth circuit in the Delk Case, 158 Fed. 931 (1908); but it is definitely determined by the judgment of the supreme court that the absolute duty of the carrier extends to the maintenance in good condition at all times of the coupling apparatus required by the statute.

AMENDMENT OF 1903 TO SAFETY ACT.

§ 525. Amendment of 1903.

AN ACT To amend an Act entitled "An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes," approved March second, eighteen hundred and ninety-three, and amended April first, eighteen hundred and ninety-six.

§ 525 (374). Amendment of 1903.—*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the provisions and requirements of the Act entitled "An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes, and their locomotives with driving-wheel brakes, and for other purposes," approved March second, eighteen hundred and ninety-three, and amended April first, eighteen hundred and ninety-six, shall be held to apply to common carriers by railroads in the Territories and the District of Columbia and shall apply in all cases, whether or not the couplers brought together are of the same kind, make, or type; and the provisions and requirements hereof and of said acts relating to train brakes, automatic couplers, grab irons, and the height of drawbars shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and in the Territories and the District of Columbia, and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith, excepting those trains, cars, and locomotives exempted by the provisions of section six of said act of March second, eighteen hundred and ninety-three, as amended by the act of April first, eighteen hundred and ninety-six, or which are used upon street railways.

SEC. 2. That whenever, as provided in said act, any train is operated with power or train brakes, not less than fifty per centum of the cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing such train; and all power-brake cars in such train which are associated together with said fifty per centum shall have their brakes so used and operated; and, to more fully carry into effect the objects of said act, the Interstate Commerce Commission may, from time to time, after full hearing, increase the minimum percentage of the cars in any train required to be operated with

power or train brakes which must have their brakes used and operated as aforesaid; and failure to comply with any such requirement of the said Interstate Commerce Commission shall be subject to the like penalty as failure to comply with any requirement of this section.

SEC. 3. That the provisions of this act shall not take effect until September first, nineteen hundred and three. Nothing in this act shall be held or construed to relieve any common carrier, the Interstate Commerce Commission, or any United States district attorney from any of the provisions, powers, duties liabilities, or requirements of said act of March second, eighteen hundred and ninety-three, as amended by the act of April first, eighteen hundred and ninety-six; and all of the provisions, powers, duties, requirements and liabilities of said act of March second, eighteen hundred and ninety-three, as amended by the act of April first, eighteen hundred and ninety-six, shall, except as specifically amended by this act, apply to this act.

As to the effect of this amendment under the construction of section 2, see decision of the supreme court in the Schlemmer Case, where it was held that this act indicated the intent of the original act in the construction of section 2.

SAFETY ACT OF 1910.

§ 526. Safety Act of 1910.

§ 526. Safety Act of 1910.

AN ACT To supplement "An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving wheel brakes and for other purposes," and other safety appliance Acts, and for other purposes.

Be it enacted by the Senate and House of Representatives of

[To what carriers applicable.]

the United States of America in Congress assembled, That the provisions of this Act shall apply to every common carrier and every vehicle subject to the Act of March second, eighteen hundred and ninety-three, as amended April first, eighteen hundred and ninety-six, and March second, nineteen hundred and three, commonly known as the "Safety Appliance Acts."

[When act effective.]

SEC. 2. That on and after July first, nineteen hundred and eleven, it shall be unlawful for any common carrier subject to the provisions of this Act to haul, or permit to be hauled or used on its line any car subject to the provisions of this Act not equipped with appliances provided for in this Act, to wit:

[Cars to be equipped with sill steps, hand brakes, ladders, running boards, and grab irons.]

All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure hand holds or grab irons on their roofs at the tops of such ladders: *Provided*, That in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars while they are thus combined for such purpose.

[Commission to designate number, dimensions, location, and manner of application of appliances.]

SEC. 3. That within six months from the passage of this Act the Interstate Commerce Commission, after hearing, shall designate the number, dimensions, location, and manner of application of the appliances provided for by section two of this Act and section four of the Act of March second, eighteen hundred and ninety-three, and shall give notice of such designation to all common carriers subject to the provisions of this Act by such

means as the Commission may deem proper, and thereafter said number, location, dimensions, and manner of application as designated by said Commission shall remain as the standards of equipment to be used on all cars subject to the provisions of this Act, unless changed by an order of said Interstate Commerce Commission, to be made after full hearing and for good cause shown; and failure to comply with any such requirement of the Interstate Commerce Commission shall be subject to a like penalty as failure to comply with any requirement of this Act: *Pro-*

[Period of compliance may be extended.]

vided, That the Interstate Commerce Commission may upon full hearing and for good cause, extend the period within which any common carrier shall comply with the provisions of this section with respect to the equipment of cars actually in service upon the

[Commission may modify height of drawbars.]

date of the passage of this Act. Said commission is hereby given authority, after hearing, to modify or change, and to prescribe the standard height of drawbars and to fix the time within which such modification or change shall become effective and obligatory,

[Present standard height of drawbars legal.]

and prior to the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard now fixed or the standard so prescribed, and after the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard so prescribed by the Commission.

[Penalty for violation of provisions of this act.]

SEC. 4. That any common carrier subject to this Act using, hauling, or permitting to be used or hauled on its line any car subject to the requirements of this Act not equipped as provided in this Act shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered as provided in section six of the Act of March second, eighteen hundred and ninety-three, as amended April first, eighteen hundred and ninety-six: *Provided*, That where any car shall have been properly equipped, as provided in this Act and the other Acts mentioned herein, and such equipment shall have become defective

[Defective cars may be hauled to nearest available repair point.]

or insecure while such car was being used by such carrier upon its line of railroad, such car may be hauled from the place where such equipment was first discovered to be defective or insecure to the nearest available point where such car can be repaired, without liability for the penalties imposed by section four of this Act or section six of the Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six, if such movement is necessary to make such repairs and such repairs can not be made except at such repair point; and such movement or hauling of such car

[Carriers not relieved from liability for death or injury.]

shall be at the sole risk of the carrier, and nothing in this section shall be construed to relieve such carrier from liability in any remedial action for the death or injury of any railroad employee caused to such employee by reason of or in connection with the movement or hauling of such car with equipment which is defective or insecure or which is not maintained in accordance with the requirements of this Act and the other Acts herein referred to; and nothing in this proviso shall be construed to per-

[Hauling by chains.]

mit the hauling of defective cars by means of chains instead of drawbars, in revenue trains or in association with others cars that are commercially used, unless such defective cars contain live stock or "perishable" freight.

[Enforcement.]

SEC. 6. That it shall be the duty of the Interstate Commerce Commission to enforce the provisions of this Act, and all powers heretofore granted to said Commission are hereby extended to it for the purpose of the enforcement of this Act.

Public, No. 133, approved, April 14, 1910.

[Employment of inspectors.]

Sundry civil act (appropriations) of June 28, 1902, authorizes Commission to employ "inspectors to execute and enforce the requirements of the safety-appliance Act."

THE EMPLOYERS' LIABILITY ACT.

- § 527. The Employers' Liability Act of 1906.
- 528. The act of 1906 invalid as to interstate carriers.
- 529. The act of 1906 valid as to the District of Columbia and the territories.
- 530. The Employers' Liability Act of 1908.
- 531. The amendatory act of April 5, 1910.
- 532. The construction of the act of 1908.
- 533. The abolition of contributory negligence in connection with the Safety Appliance Act.
- 534. The amendment of 1910.
- 535. The amendment of 1910 not retroactive.
- 536. What is employment in interstate commerce.
- 537. Concurrent jurisdiction of the state courts.
- 538. The prohibition of contracting out of the act.
- 539. The superseding of state statutes.
- 540. Right of removal under the act.

§ 527. The Employers' Liability Act of 1906.

AN ACT Relating to liability of common carriers in the District of Columbia and Territories and common carriers engaged in commerce between the states and between the states and foreign nations to their employees.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every common carrier engaged in trade or commerce in the District of Columbia, or in any Territory of the United States, or between the several States, or between any Territory and another State, or between any Territory or Territories and any State or States, or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, shall be liable to any of its employees, or, in the case of his death, to his personal representative for the benefit of his widow and children, if any, if none, then for his parents, if none, then for his next of kin dependent upon him, for all damages which may result from the negligence of any of its officers, agents, or employees, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways or works.

SEC. 2. That in all actions hereafter brought against any common carriers to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery where his contributory negli-

gence was slight and that of the employer was gross in comparison, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. All questions of negligence and contributory negligence shall be for the jury.

SEC. 3. That no contract of employment, insurance, relief benefit, or indemnity for injury or death entered into by or on behalf of any employee, nor the acceptance of any such insurance, relief benefit, or indemnity by the person entitled thereto, shall constitute any bar or defense to any action brought to recover damages for personal injuries to or death of such employee: *Provided, however,* That upon the trial of such action against any common carrier the defendant may set off therein any sum it has contributed toward any such insurance, relief, benefit, or indemnity that may have been paid to the injured employee, or, in case of his death, to his personal representative.

SEC. 4. That no action shall be maintained under this Act, unless commenced within one year from the time the cause of action accrued.

SEC. 5. That nothing in this Act shall be held to limit the duty of common carriers by railroads or impair the rights of their employees under the safety-appliance Act of March second, eighteen hundred and ninety-three, as amended April first, eighteen hundred and ninety-six, and March second, nineteen hundred and three.

Approved June 11, 1906.

§ 528. **The act of 1906 invalid as to interstate carriers.**—In what is known as the Employers' Liability Case, *Howard v. Illinois Central R. R. Co.*, 207 U. S. 463, 52 L. Ed. 297 (1907), the supreme court held this act of 1906 invalid as to interstate carriers, in that it went beyond the power of congress under the commerce clause, by including all the employes of said carriers and in not limiting the act to the employes engaged in said commerce. Five justices concurred in the opinion holding that this part of the act, thus held invalid, could not be separated from the provisions of the act as to interstate employes, so the entire act as to interstate carriers was held void.

Four justices (Moody, Harlan, McKenna and Holmes) dissented, holding not only that the act in its main features was valid, but that the attempted regulation of intrastate employes could and should be separated from the other provisions of the act. Three of the justices concurring in the conclusion that the act was invalid did not concur in the assumption of the opinion

that congress could regulate the relation of master and servant in interstate commerce.

It seems therefore that six of the justices concurred in maintaining the power of congress to regulate the liability of interstate carriers to their employes engaged in interstate commerce.

§ 529. The act of 1906 valid as to District of Columbia and the territories.—So much of the act as related to the District of Columbia and the territories, was not based upon the power of congress to regulate commerce among the states but upon its power as a single sovereign with full legislative authority, and in *El Paso & N. R. Co. v. Gutierrez*, 215 U. S. 87, 54 L. Ed. 106 (1909), the court without dissent declared that the invalidity of the act as to interstate commerce as declared in the *Howard Case*, *supra*, did not invalidate such of its provisions as regulate commerce within the district of Columbia and the territories, affirming the supreme court of Texas in 117 S. W. 426.

In this opinion the court approved the opinion of the court of appeals of the district of Columbia holding the act valid as to the district of Columbia in *Hyde v. Southern R. R. Co.*, 31 App. D. C. 466.

§ 530. The Employers' Liability Act of 1908.

AN ACT Relating to the liability of common carriers by railroad to their employees in certain cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories, and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee. for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

SEC. 2. That every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

SEC. 3. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employee or where said injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

SEC. 4. That in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

SEC. 5. That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this Act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

SEC. 6. That no action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued.

SEC. 7. That the term "common carrier" as used in this act shall include the receiver or receivers or other persons or cor-

porations charged with the duty of the management and operation of the business of a common carrier.

SEC. 8. That nothing in this Act shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other Act or Acts of Congress, or to affect the prosecution of any pending proceeding or right of action under the Act of Congress entitled, "An Act relating to liability of common carriers in the District of Columbia and Territories, and to common carriers engaged in commerce between the States and between the States and foreign nations to their employees," approved June eleventh, nineteen hundred and six.

Approved, April 22, 1908.

§ 531. The amendatory act of April 5, 1910.

AN ACT To amend an Act entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases," approved April 22, 1908.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That an Act entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases," approved April twenty-second, nineteen hundred and eight, be amended in section six so that said section shall read:

"SEC. 6. That no action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued.

"Under this Act an action may be brought in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this Act shall be concurrent with that of the courts of the several States, and no case arising under this Act and brought in any state court of competent jurisdiction shall be removed to any court of the United States."

"SEC. 2. That said Act be further amended by adding the following section as section nine of said Act:

"SEC. 9. That any right of action given by this Act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury."

Approved April 5, 1910.

§ 532. Construction of act of 1908.—The act of 1908 differs from that of 1906, in that it sets out in separate sections the ex-

ercise of the power of congress under the commerce clause in regulating interstate railroad carriers (sec. 1), and its plenary powers over railroad carriers in the territories, the district of Columbia and other possessions of the United States, where congress exercises sovereign authority (sec. 2).

The act has been sustained in *Zikos v. Oregon R. & N. Co.*, 179 Fed. 893, E. D. Wash. (1910), and in *Watson v. I. M. & S. R. Co.*, 169 Fed. 942 (1909), where it was held to be valid and within the lawful power of congress and free from the infirmities of the act of 1906. The act has not (Oct. 1911) been directly passed upon by the supreme court but was referred to in the decision in the *Schlemmer Case*, *supra*, § 523, and in the *Deik Case*, *supra*, as amending the Safety Appliance Act, see *supra*, § 507.

It was held in these cases that the abolition of the fellow servant rule in the case of carriers by rail was not an arbitrary or unreasonable classification, and under the commerce clause congress had the power to regulate the relation of master and servant of carriers by rail engaged in interstate transportation, if limited to employees when engaged in interstate service. The validity of the act has also been assumed in other cases of the circuit and in the circuit court of appeals of the eighth circuit. *Johnson v. Great Northern Ry. Co.*, 178 Fed. 643 (1910).

§ 533. The abolition of contributory negligence in connection with the Safety Appliance Act.—Under the proviso of section 3 of the act of 1908 no employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation of such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe.

This provision was applied and enforced in *Johnson v. Great Northern Railway Co.*, *supra*, as amending the Safety Appliance Act and making the question of assumption of risk and contributory negligence immaterial in an action under the Safety Appliance Act. The court said that the plaintiff whose duty it was to see to the coupling of the cars and the air hose upon the cars which were upon the transfer track—some of the cars, among them the one in question, engaged in interstate commerce—was an employe engaged in interstate commerce. The supreme

court also in two cases,—in the Schlemmer Case, *supra*, and the Deik Case, *supra*,—recognized the act of 1908 as amending the Safety Appliance Act. It follows, therefore, that under this proviso the defense of contributory negligence as well as that of the assumption of risk is taken away where the failure of the carrier to provide the safety appliances required by law contributes to the injury or death of the employe.

§ 534. The amendment of 1910.—The purpose of the amendment of 1910 is illustrated in the case of *Newell v. B. & O. R. R. Co.*, 181 Fed. 698, W. D. of Pa. In this case a citizen of Pennsylvania sued a Maryland corporation in the federal circuit court of Pennsylvania to recover damages for injuries wherein the federal jurisdiction under the compliant rested exclusively on diverse citizenship, the plaintiff thereafter amending his complaint to show cause for injury while engaged in interstate commerce under this act. The court held that it was thereby deprived of jurisdiction, as the suit was brought in the district of defendant's residence, and, under the law, where jurisdiction is founded not only on diverse citizenship within the meaning of the judiciary act as amended, the suit can be brought only in the district of which the defendant is an inhabitant. The same ruling was made in other circuits. See *Cound v. A. T. & S. F. Ry. Co.*, 173 Fed. 527 (1909), W. D. Tex.; *Whittaker v. I. C. Ry.*, 176 Fed. 130, C. C. La. Prior to this amendment of 1910, the act made no provision of the survival of the action so given for an injury sustained in the event of the death of the injured party. See *Fulgham v. Midland Valley* (1909), 167 Fed. 660.

§ 535. The amendment of 1910 not retroactive.—In this *Newell* Case, the matter of jurisdiction came before the court after the amendment of 1910 had been adopted. The court said that the amendment of 1910 did not confer jurisdiction upon pending suits, and the very fact that such an enactment was deemed necessary by congress, was persuasive that prior thereto such action could only be brought in accordance with the acts conferring jurisdiction upon the circuit court; and as the jurisdiction sought was not founded only upon diverse citizenship, but upon a federal right, the suit could be brought only in the district of defendant's residence.

The Act of 1910 removes this difficulty as to actions thereafter

brought, so that suits can now be filed in the district of the residence of the defendant, or in which the cause of action arises, or in which the defendant is doing business during the time of commencing the action.

§ 536. What is employment in interstate commerce?—The most difficult question in the application of the act is the determination of what is employment in interstate commerce within the meaning of the act. The act of 1906 was declared invalid, for the reason that it applied to employes of interstate carriers, whether those employes were employed in interstate or intrastate commerce; so it must be proven that the employes are engaged in intrastate commerce in order to sustain a recovery under the act. Thus the same employes may be employed at times in interstate and at times in intrastate service, as to the same track, and the same equipment and in the same stations are used for both kinds of traffic.

In *Taylor v. S. Ry. Co.*, 178 Fed. 380, 1910, it was held that a member of a railroad bridge gang, injured while engaged within the scope of his employment in repairing bridges by an alleged defective scaffold, though his duty required work in the repair of bridges in different states, was not engaged in interstate commerce. On the other hand, it was held in *Zikos v. Ore. R. & N. Co.*, *supra*, that a section hand working on the track of the railroad over which both interstate and intrastate trains moved was employed in interstate commerce within the meaning of the act. In that case, the court said that where the employment necessarily and directly contributes to the more extended use, and without which interstate traffic could not be carried on at all, no reason appears for denying the power over the one, although it may indirectly contribute to the other.

The particular question is an apt illustration of the intricacy to which our dual system of government often leads; but the intricacy is but an incident, and it can neither defeat nor impair the power of congress over interstate commerce.

In *Colasurdo v. C. R. R. of N. J.*, 180 Fed. 832, the court held that a track walker injured while assisting in repairing a switch in a railroad yard, and injured through the negligence of his fellow employes, was engaged in interstate commerce, and was entitled to the right secured by the act; and that the statute did not say

that the injury must arise from an act done in interstate commerce, and that it was immaterial whether the train was engaged in interstate commerce or not.

§ 537. Concurrent jurisdiction of the state courts.—There is no exclusive jurisdiction in the federal courts declared in this act; but, on the contrary, in the amendment of 1910 it specifically provided in section 6, as amended, that the jurisdiction of the courts of the United States under this act shall be concurrent with the courts of the several states, and no case arising under this act and brought in any court of competent jurisdiction shall be removed to any court of the United States. This amendment was enacted after the opinion in *Hoxie v. N. Y., N. H. & H. R. R.*, 82 Conn. 352, wherein the court declined jurisdiction of a suit asserting rights under this act, upon the ground among other things that congress did not intend that jurisdiction arising under this act should be exercised by the state courts.

It has also been held (see *Whittaker v. I. C. Ry.*, *supra*) that where the petition states facts which bring the case within the Employers Liability Act, it is covered by the act, whether specifically declared so or not.

In the *Colasurdo Case*, *supra*, also prior to the amendment of 1910, the court held in an action removed from the state court, that it was not subject to remand, though it appeared in the trial that the parties were citizens of the same state, if it appeared from the complaint that plaintiff sought to recover under the Employers Liability Act, and where such an averment was made, the federal jurisdiction existed, even though the complaint was dismissed because the plaintiff was not a person so employed.

It has also been held prior to the amendment of 1910 in *Miller v. I. C. R. R.*, 168 Fed. 982, that, where it did not appear from plaintiff's declaration that the construction of this act was involved, the cause was not removable as arising under the laws of the United States. Under this amendment declaring concurrent jurisdiction in the state and federal courts plaintiff in suing in the latter must show in his petition either diverse citizenship, or as assertion of his right of recovery under this statute, and in either case, he must also show the jurisdictional amount of \$2,000.00 (after January 1, 1912, \$3,000.00) in controversy.

§ 48.

§ 538. Prohibition of contracting out of the act.—It was said by Justice Moody in his dissenting opinion in the Howard case that this prohibition of contracting out of the act which was contained also in the act of 1906, that this clause was open to possible objections, but without intimating any opinion he said that part of the act was separable and independent of the remainder. This was also commented on in the Zikos case, that it was not involved in that case, and the court said that in any event it was clearly separable. The purpose of this enactment was obviously to make legislation effective by prohibiting contracts of exemption against the liability created by the act. Such contracts against liability under statutory requirements have been held violative of public policy, irrespective of statutory prohibition. The prohibition of contracting out of a remedial statute would seem distinguishable from a contract of exemption made by an express agent of the railroad company, entered into as a condition of his employment, such as was held valid in *B. & O. Ry. v. Voight*, 176 U. S. 497, 44 Fed. 560.

§ 539. The superseding of state statutes.—It was held in *Fulgham v. Midland Valley Ry. W. D. of Ark.*, 167 Fed. 660, 1909, that the act of 1908 supersedes all state statutes regulating the relations of interstate employers and employes engaged in interstate commerce. The court said that the whole act clearly showed that congress undertook the regulation of the relation of employers and employes, that it covered and overlapped the whole state legislation, and was therefore conclusive. This was also the ruling in the *Cound Case*, where the act of 1908 was held to supersede the common law in the territories, in respect to such liability. The supreme courts of Wisconsin and Missouri held that this was in accordance with the rule of the state courts of those states in relation to the nine hour law of congress, *supra*.

§ 540. Right of removal under the act.—The provision of the amendment of 1910, providing that no case arising under the act and brought in the state court of competent jurisdiction should be removed to any court of the United States, was construed in *Van Brimmer v. Texas, etc., R. Co.*, 190 Fed. 394, Oct. 1911, by C. C. E. D. Tex., where it was held that this amendment did not deprive a litigant of his right to remove his case to the federal court, if he had that right by reason of diverse citizenship or on account of prejudice or local influence, but only that when a cause arose under the act the suit should not for that reason be removed to the federal court.

THE HOURS OF SERVICE ACT OF 1907.

§ 541. The act of 1907.

542. The constitutionality of the act sustained.

543. The statute not void for uncertainty.

544. The Interstate Commerce Commission had authority to require reports.

545. No privilege to a corporation or corporation officers against self-incrimination.

§ 541. The act of 1907.

AN ACT To promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of this Act shall apply to any common carrier or car-

[Common carrier and employees subject to act.]

riers, their officers, agents, and employees, engaged in the transportation of passengers or property by railroad in the District of Columbia or any Territory of the United States, or from one State or Territory of the United States or the District of Columbia to any other State or Territory of the United States or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States.

[Meaning of term "railroad."]

The term "railroad" as used in this Act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or

[Meaning of term "employees."]

lease; and the term "employees" as used in this Act shall be held to mean persons actually engaged in or connected with the movement of any train.

[Sixteen hours the maximum continuous service of trainmen.]

SEC. 2. That it shall be unlawful for any common carrier, its officers or agents, subject to this Act to require or permit any employee subject to this Act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employee of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved and not required or

[Ten consecutive hours off duty.]

permitted again to go on duty until he has had at least ten con-

secutive hours off duty; and no such employee who has been on duty sixteen hours in the aggregate in any twenty-four-hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off

[Service hours of telegraph and telephone operators.]

duty: *Provided*, That no operator, train dispatcher, or other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four-hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places, and stations operated only during the daytime, except in case of emergency, when the employees named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four-hour period on not exceeding three days in any week: *Provided*

[Commission may extend period.]

further, The Interstate Commerce Commission may after full hearing in a particular case and for good cause shown extend the period within which a common carrier shall comply with the provisions of this proviso as to such case.

[Penalty for violation.]

SEC. 3. That any such common carrier, or any officer or agent thereof, requiring or permitting any employee to go, be, or remain on duty in violation of the second section hereof, shall be liable to a penalty of not to exceed five hundred dollars for each and every violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district

[Prosecutions.]

court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such district attorney to bring such suits upon satisfactory information being lodged with him; but no such suit shall be brought after the expiration of one year from the date of such violation; and it shall also be the duty of the Interstate Commerce Commission to lodge with the proper district attorneys information of any such violations as may come to its knowledge. In all prosecutions under this Act the common carrier shall be deemed to have had knowledge of all acts of all its officers and agents: *Provided*, That the provisions of this Act shall not apply

[Unavoidable, accidents, etc.]

in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agents in charge of such employee at the time said employee left a terminal, and which could not have been

[Wrecking, etc., crews.]

foreseen: *Provided further*, That the provisions of this Act shall not apply to the crews of wrecking or relief trains.

[Enforcement.]

SEC. 4. It shall be the duty of the Interstate Commerce Commission to execute and enforce the provisions of this Act, and all powers granted to the Interstate Commerce Commission are hereby extended to it in the execution of this Act.

[Effective.]

SEC. 5. That this Act shall take effect and be in force one year after its passage.

Approved March 4, 1907.

§ 542. The constitutionality of the act sustained.—In *B. & O. R. Co. v. Interstate Commerce Commission*, 221 U. S. —, 55 L. Ed. 878, the supreme court in May, 1911, affirmed the circuit court of Maryland in sustaining a demurrer to a bill of the B. & O. Railroad seeking to enjoin the enforcement of an order of the Interstate Commerce Commission requiring monthly reports from railroads subject to this act. It was claimed that penalties were not limited to interstate commerce, but applied to intrastate railroads and to employes engaged in local business. The court said that the statute in its scope was materially different from the employers liability act of 1906, as there the act applied to any employes of the carrier, while in this statute the limiting words governed employes as well as the carriers. The court said, even if it were true that the interstate and the intrastate operations of its carriers were so interwoven, that it was impracticable for them to divide their employes in such manner that the duties of those who are engaged in connection with interstate commerce could not be confined to that commerce exclusively; the constitutional authority of congress could not be thus denied its effective exercise in its powers to provide for the safety of employes and travelers. Congress was not limited to laws relating to mechanical appliances, but could recognize that the length of hours of service had a direct relation to the efficiency of human agencies upon which protection to life and property necessarily depends. The power of congress therefore to limit the hours of labor of those employes engaged in interstate transportation could not be defeated either by prolonging the period of service through other requirements of the carriers, or by the commanding of duties relating to interstate and intrastate operations.

§ 543. The statute not void for uncertainty.—The court said that the words “except in case of emergency” in section two did not make the application of the act so uncertain as to destroy its

validity. Congress had the power to use the general description, and in the legal sense there was no uncertainty. Congress by an appropriate description of an exceptional class had established a standard with respect to which cases that arise must be adjudged. The court said the broad scope of the proviso in section three even if it was construed to include everything that could be included in the emergency clause in section two would not be merely a duplication which would not invalidate the act.

§ 544. The Interstate Commerce Commission had authority to require reports.—In the same case the court said that the authority to require the secretary or other officers of the carriers subject to this act to make monthly reports under oath showing the instances where employes subject to the act had rendered excess services, and giving the cause and explanatory facts, if any, or where there had been no excess service to make the separate oath to that effect, was conferred upon the Interstate Commerce Commission by the provision of section four of the act; in connection with the amendments of the Interstate Commerce Act of June 18, 1910, authorizing the commission to require the carriers to file periodical or special reports under oath concerning any matter upon which it is by law authorized or required to keep itself informed or which it is required to enforce.

§ 545. No privilege to a corporation or corporation officers against self-incrimination.—In the same case it was ruled that there was no violation of the constitutional provision against unreasonable searches and seizures in the requirements of the reports under this act, and neither the corporation subject to the act nor the officers of the corporation could claim a privilege against self-incrimination to justify refusal to make such reports. The transactions to which the required reports related were corporate transactions subject to the regulating power of congress and the officers of the corporation are bound by the corporate obligation, and could not claim a personal privilege in hostility to the requirement.

THE TWENTY-EIGHT HOUR LIVE STOCK TRANSPORTATION LAW.

§ 546. The twenty-eight hour act.

547. Delivery to connecting carrier.

548. Accidental or unavoidable causes defined.

549. Violation of rules and regulations of company no defense.

550. Press of business.

551. Requested confinement—Question for jury.

552. Burden of proof.

553. The government is entitled to writ of error.

554. Pleadings.

555. "Wilfully" construed.

556. Who subject to the act.

557. Place of bringing suits.

558. Procedure—Unit of offense.

AN ACT To prevent cruelty to animals while in transit by railroad or other means of transportation from one state or territory or the District of Columbia into or through another state or territory or the District of Columbia, and repealing sections forty-three hundred and eighty-six, forty-three hundred and eighty-seven, forty-three hundred and eighty-eight, forty-three hundred and eighty-nine, and forty-three hundred and ninety of the United States revised statutes.

§ 546. The twenty-eight hour live stock transportation law.
Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That no railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, whose road forms any part of a line of road over which cattle, sheep, swine, or other animals shall be conveyed from one State or Territory or the District of Columbia into or through another State or Territory or the District of Columbia, or the owners or masters of steam, sailing, or other vessels carrying or transporting cattle, sheep, swine, or other animals from one State or Territory or the District of Columbia into or through another State or Territory or the District of Columbia, shall confine the same in cars, boats, or vessels of any description for a period longer than twenty-eight consecutive hours without unloading the same in a humane manner, into properly equipped pens for rest, water and feeding, for a period of at least five consecutive hours, unless prevented by storm or by other accidental or unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight: *Provided*, That upon the written request of the owner or person in custody of that particular

shipment, which written request shall be separate and apart from any printed bill of lading, or other railroad form, the time of confinement may be extended to thirty-six hours. In estimating such confinement, the time consumed in loading and unloading shall not be considered, but the time during which the animals have been confined without such rest or food or water on connecting roads shall be included, it being the intent of this Act to prohibit their continuous confinement beyond the period of twenty-eight hours, except upon the contingencies hereinbefore stated: *Provided*, That it shall not be required that sheep be unloaded in the nighttime, but where the time expires in the nighttime in case of sheep the same may continue in transit to a suitable place for unloading, subject to the aforesaid limitation of thirty-six hours.

SEC. 2. That animals so unloaded shall be properly fed and watered during such rest either by the owner or person having the custody thereof, or in case of his default in so doing, then by the railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee or any of them, or by the owners or masters of boats or vessels transporting the same, at the reasonable expense of the owner or person in custody thereof, and such railroad, express company, car company, common carrier other than by water, receiver, trustee, or lessee of any of them, owners or masters, shall in such case have a lien upon such animals for food care and custody furnished, collectible at their destination in the same manner as the transportation charges are collected, and shall not be liable for any detention of such animals, when such detention is of reasonable duration, to enable compliance with section one of this Act; but nothing in this section shall be construed to prevent the owner or shipper of animals from furnishing food therefor, if he so desires.

SEC. 3. That any railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee, of any of them, or the master or owner of any steam, sailing, or other vessel who knowingly and willfully fails to comply with the provisions of the two preceding sections shall for every such failure be liable for and forfeit and pay a penalty of not less than hundred nor more than five hundred dollars: *Provided*: That when animals are carried in cars, boats, or other vessels in which they can and do have proper food, water, space, and opportunity to rest the provisions in regard to their being unloaded shall not apply.

SEC. 4. That the penalty created by the preceding section shall be recovered by civil action in the name of the United States in the circuit or district court holden within the district where the violation may have been committed or the person or corporation resides or carries on business; and it shall be the duty of

THE TWENTY-EIGHT HOUR LIVE STOCK TRANSPORTATION LAW.

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AN ACT To prevent cruelty to animals while in transit by railroad or other means of transportation from one state or territory or the District of Columbia into or through another state or territory or the District of Columbia, and repealing sections forty-three hundred and eighty-six, forty-three hundred and eighty-seven, forty-three hundred and eighty-eight, forty-three hundred and eighty-nine, and forty-three hundred and ninety of the United States revised statutes.

§ 546. The twenty-eight hour live stock transportation law. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.* That no railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, whose road forms any part of a line of road over which cattle, sheep, swine, or other animals shall be conveyed from one State or Territory or the District of Columbia into or through another State or Territory or the District of Columbia, or the owners or masters of steam, sailing, or other vessels carrying or transporting cattle, sheep, swine, or other animals from one State or Territory or the District of Columbia into or through another State or Territory or the District of Columbia, shall confine the same in cars, boats, or vessels of any description for a period longer than twenty-eight consecutive hours without unloading the same in a humane manner, into properly equipped pens for rest, water and feeding, for a period of at least five consecutive hours, unless prevented by storm or by other accidental or unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight: *Provided*, That upon the written request of the owner or person in custody of that particular

shipment, which written request shall be separate and apart from any printed bill of lading, or other railroad form, the time of confinement may be extended to thirty-six hours. In estimating such confinement, the time consumed in loading and unloading shall not be considered, but the time during which the animals have been confined without such rest or food or water on connecting roads shall be included, it being the intent of this Act to prohibit their continuous confinement beyond the period of twenty-eight hours, except upon the contingencies hereinbefore stated: *Provided*, That it shall not be required that sheep be unloaded in the nighttime, but where the time expires in the nighttime in case of sheep the same may continue in transit to a suitable place for unloading, subject to the aforesaid limitation of thirty-six hours.

SEC. 2. That animals so unloaded shall be properly fed and watered during such rest either by the owner or person having the custody thereof, or in case of his default in so doing, then by the railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee or any of them, or by the owners or masters of boats or vessels transporting the same, at the reasonable expense of the owner or person in custody thereof, and such railroad, express company, car company, common carrier other than by water, receiver, trustee, or lessee of any of them, owners or masters, shall in such case have a lien upon such animals for food care and custody furnished, collectible at their destination in the same manner as the transportation charges are collected, and shall not be liable for any detention of such animals, when such detention is of reasonable duration, to enable compliance with section one of this Act; but nothing in this section shall be construed to prevent the owner or shipper of animals from furnishing food therefor, if he so desires.

SEC. 3. That any railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee, of any of them, or the master or owner of any steam, sailing, or other vessel who knowingly and willfully fails to comply with the provisions of the two preceding sections shall for every such failure be liable for and forfeit and pay a penalty of not less than hundred nor more than five hundred dollars: *Provided*: That when animals are carried in cars, boats, or other vessels in which they can and do have proper food, water, space, and opportunity to rest the provisions in regard to their being unloaded shall not apply.

SEC. 4. That the penalty created by the preceding section shall be recovered by civil action in the name of the United States in the circuit or district court holden within the district where the violation may have been committed or the person or corporation resides or carriers on business; and it shall be the duty of

the United States attorneys to prosecute all violations of this Act reported by the Secretary of Agriculture, or which come to their notice or knowledge by other means.

SEC. 5. That sections forty-three hundred and eighty-six, forty-three hundred and eighty-seven, forty-three hundred and eighty-eight, forty-three hundred and eighty-nine, and forty-three hundred and ninety of the Revised Statutes of the United States be, and the same are hereby, repealed.

Approved, June 29, 1906.

§ 547. **Delivery to connecting carrier.**—It was held in the district court, northern district California in *U. S. v. Southern Pac. R. Co.*, 157 Fed. 459 (1907), that a railroad company which delivers its cars containing such stock to a connecting carrier without keeping the same confined longer than a period of twenty-eight hours is relieved from responsibility. See also *M. K. & T. R. Co. v. U. S.*, 178 Fed. 15 (1910).

§ 548. **Accidental or unavoidable causes defined.**—“An accidental or unavoidable cause which cannot be anticipated or avoided by the exercise of due diligence and foresight” is one which cannot be avoided by that degree of prudence, foresight, care and caution which the law requires of every one under the circumstances of the particular case, and which would have been exercised by a man of ordinary prudence under such circumstances. *United States v. Southern Pacific R. Co.*, 178 Fed. 15. On the other hand in *Montana Cent. R. Co. v. U. S.*, 164 Fed. 400 (1908), it was held that the twenty-eight hour law is not a criminal statute and the violation was not excused by oversight or unintentional neglect.

As to the accidental and unavoidable that come within the section of the statute, see *U. S. v. A., T. & S. F. R. Co.*, 166 Fed. 160 (1908), that a company must know how long a connecting carrier had kept the animals without food or water and must learn such fact at its peril. *U. S. v. St. Joe Stock Yds. Co.*, 181 Fed. 625 (1911).

§ 549. **Violation of rules and regulation of company no defense.**—In *U. S. v. Atlantic Coast Line*, 173 Fed. 764, C. C. A. 4th Cir. 1909, the fact that the company had made rules and regulations requiring the employees to comply with the act and

that its violation was the act of the employe in disobeying the rules was no defense.

§ 550. Press of business.—Nor does press of business excuse a violation of the Act. *U. S. v. Union Pacific R. Co.*, 169 Fed. 65, 1909.

§ 551. Requested confinement:—Question for jury.—In *U. S. v. Terminal Stock Yards Co.*, 172 Fed. 452 (1909), it was held that the first thirty-six hour confinement could not be counted against the carrier if requested by the owner. And the period beyond the twenty-eight hours (or thirty-six hours if requested). See *U. S. v. Sioux City, etc., Co.*, 162 Fed. 556. In *M. K. & T. R. Co. v. U. S.*, 178 Fed. 15, 8th Cir. 1910, it was held that the question of conformity to the request of extension was for the court and not the jury because a written instrument was involved.

§ 552. Burden of proof.—The government is required to establish its case only by a preponderance of evidence and each independent shipment is a basis for a separate charge. *U. S. v. Southern Pacific*, 157 Fed. 459; *M. K. & T. R. Co. v. U. S.*, 178 Fed. 15, eighth circuit; *U. S. v. N. Y. & C. R. Co.*, 168 Fed. 699, C. C. A. second circuit; *U. S. v. B. & O. S. W. R. Co.*, 159 Fed. 33, C. C. A. sixth circuit; *U. S. v. Oregon & R. N. Co.*, 163 Fed. 642. On the other hand it was held in the district court of Kentucky (*U. S. v. L. & N. R. Co.*, 165 Fed. 936), that the twenty-eight hour law is a criminal statute and although the action is civil in form the defendant is presumed innocent until proven guilty beyond a reasonable doubt. As to burden of proof, see *U. S. v. Oregon Short Line*, 160 Fed. 526.

§ 553. The government is entitled to writ of error.—And the government is entitled to a writ of error. *U. S. v. N. Y. C., etc., Co.*, 168 Fed. 699, second circuit; *U. S. v. B. & O. S. W. R. Co.*, 159 Fed. 33, C. C. A. sixth circuit.

§ 554. Pleadings.—As to the necessity of pleading the exceptions of the statute see *N. Y. & C. H. R. Co. v. U. S.*, 165 Fed. 883.

§ 555. "Wilfully" construed.—For case construing the word "wilfully" as used in the statute, see *U. S. v. A., T. & S. F. R. Co.*, 166 Fed. 160; *N. Y. Cent. & H. R. Co. v. U. S.*, 165 Fed. 833, first circuit; *Houston, etc., Co. v. U. S.*, 168 Fed. 895; *U. S. v. Sioux City, etc., Co.*, 162 Fed. 556; *U. S. v. Union Pacific R. Co.*, 169 Fed. 65; *M. K. & T. R. Co. v. U. S.*, 178 Fed. 15.

§ 556. Who subject to the act.—In *U. S. v. St. Joseph Stock Yards Co.*, 168 Fed. 625, it is held that a stock yard company doing what is known as the terminal business was held subject to the provisions of the act; to the same effect is *U. S. v. Sioux City Stock Yards Co.*, 162 Fed. 556.

§ 557. Place of brining suits.—As to the place of bringing suit, see *Southern Pacific R. Co. v. U. S.*, 171 Fed. 364; *St. L. & St. F. R. Co. v. U. S.*, 169 Fed. 69, eighth circuit.

§ 558. Procedure—Unit of offense.—In *B. & O. S. W. R. Co. v. U. S.*, 220 U. S. 94, 55 L. Ed. 384 (1911), the act was construed by the supreme court modifying the decision of the United States Circuit Court of Appeals of the 6th Circuit, 159 Fed. 33, and it was held that but one penalty could be recovered against a carrier for the loading, and that other separate and distinct penalties accrued, as the time for the lawful confinement of the cattle loaded at later periods successively expired. The court said that the statute was not primarily intended for the benefit of the owners but to prevent cruelty to animals in transit. The court also held that the aggregate sum of the possible penalties is the amount in dispute for the purpose of sustaining the appellate jurisdiction of the supreme court; and that the circuit court may properly consolidate under U. S. R. S. 921 several actions by the United States against a carrier to recover the penalties prescribed by this act.

APPENDIX

1. The Commerce Court Act.
2. National Trade Union Incorporation Act.
3. Arbitration Act.
4. Interlocking Act.
5. Ash Pan Act.
6. Report of Accidents' Act.
7. Rules of Practice before the commission.
8. Forms of procedure of commission.
9. Rules of practice of the commerce court.
10. The Report of National Securities Commission (1911).

THE COMMERCE COURT ACT OF 1910.

(Commerce Court and other additional provisions in the Act of June 18, 1910.) (SEC. 1.) That a court of the United States is

[Creation and jurisdiction of commerce court.]

hereby created which shall be known as the Commerce Court and shall have the jurisdiction now possessed by circuit courts of the United States and the judges thereof over all cases of the following kinds:

[Cases to enforce commission's orders.]

First. All cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money.

[Cases to annul commission's orders.]

Second. Cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission.

[Certain cases under Elkins Act.]

Third. Such cases as by section three of the Act entitled "An Act to further regulate commerce with foreign nations and among the States," approved February nineteenth, nineteen hundred and three, are authorized to be maintained in a circuit court of the United States.

[Mandamus proceedings.]

Fourth. All such mandamus proceedings as under the provisions of section twenty or section twenty-three of the Act entitled "An Act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, as amended, are authorized to be maintained in a circuit court of the United States.

[Circuit court jurisdiction given to commerce court.]

Nothing contained in this Act shall be construed as enlarging the jurisdiction now possessed by the circuit courts of the United States or the judges thereof, that is hereby transferred to and vested in the Commerce Court.

[Exclusive jurisdiction.]

The jurisdiction of the Commerce Court over cases of the foregoing classes shall be exclusive; but this Act shall not affect the jurisdiction now possessed by any circuit court or district court of the United States over cases or proceedings of a kind not within the above-enumerated classes.

[Composition of commerce court.]

The Commerce Court shall be a court of record, and shall have a seal of such form and style as the court may prescribe. The said Court shall be composed of five judges, to be from time to

[Term.]

time designated and assigned thereto by the Chief Justice of the United States, from among the circuit judges of the United States, for the period of five years, except that in the first instance the Court shall be composed of the five additional circuit judges to be appointed as hereinafter provided, who shall be designated by the President to serve for one, two, three, four, and five years, respectively, in order that the period of designation of one of the said judges shall expire in each year thereafter.

[Vacancies.]

In case of the death, resignation, or termination of assignment of any judge so designated, the Chief Justice shall designate a circuit judge to fill the vacancy so caused and to serve during the unexpired period for which the original designation was made. After the year nineteen hundred and fourteen no circuit judge shall be redesignated to serve in the Commerce Court until the expiration of at least one year after the expiration of the period of his last previous designation. The judge first designated for the five-year period shall be the presiding judge of said court, and thereafter the judge senior in designation shall be the presiding judge.

[Salary.]

Each of the judges during the period of his service in the commerce court shall, on account of the regular sessions of the court being held in the city of Washington, receive in addition to his salary as circuit judge an expense allowance at the rate of one thousand five hundred dollars per annum.

[Five additional circuit judges.]

The President, shall, by and with the advice and consent of the Senate, appoint five additional circuit judges no two of whom shall be from the same judicial circuit, who shall hold office during good behavior and who shall be from time to time designated and assigned by the Chief Justice of the United States for service in the circuit court for any district, or the circuit court of appeals for any circuit, or in the commerce court.

The associate judges shall have precedence and shall succeed to the place and powers of the presiding judge whenever he may be absent or incapable of acting in the order of the date of their

[Quorum.]

designations. Four of said judges shall constitute a quorum, and at least a majority of the Court shall concur in all decisions.

[Clerk and marshal.]

The Court shall also have a clerk and a marshal, with the same duties and powers, so far as they may be appropriate and are not altered by rule of the Court, as are now possessed by the clerk and marshal, respectively, of the Supreme Court of the United States. The offices of the clerk and marshal of the Court shall be in the city of Washington, in the District of Columbia. The judges of the Court shall appoint the clerk and marshal, and may also appoint, if they find it necessary, a deputy clerk and deputy marshal; and such clerk, marshal, deputy clerk, and deputy marshal shall hold office during the pleasure of the Court. The salary of the clerk shall be four thousand dollars per annum; the salary of the marshal three thousand dollars per annum; the salary of the deputy clerk two thousand five hundred dollars per annum; and the salary of the deputy marshal two thousand five hundred dollars per annum. The said clerk and marshal may, with the approval of the Court, employ all requisite assistance.

[Costs and fees.]

The costs and fees in said Court shall be established by the Court in a table thereof, approved by the Supreme Court of the United States, within four months after the organization of the Court; but such costs and fees shall in no case exceed those charged in the Supreme Court of the United States, and shall be accounted for and paid into the Treasury of the United States.

[Regular sessions in Washington.]

The Commerce Court shall always be open for the transaction of business. Its regular sessions shall be held in the city of Washington, in the District of Columbia; but the powers of the Court or of any judge thereof, or of the clerk, marshal, deputy clerk, or deputy marshal may be exercised anywhere in the United States; and for expedition of the work of the Court and the avoidance of undue expense or inconvenience to suitors the Court shall hold sessions in different parts of the United States as

[Expenses of court.]

may be found desirable. The actual and necessary expenses of judges, clerk, marshal, deputy clerk, and deputy marshal of the Court incurred for travel and attendance elsewhere than in the city of Washington shall be paid upon the written and itemized certificate of such judge, clerk, marshal, deputy clerk, or deputy marshal by the marshal of the Court, and shall be allowed to him in the statement of his accounts with the United States.

[Sessions may be held in other places.]

The United States marshals of the several districts outside of the city of Washington in which the Commerce Court may hold its sessions shall provide, under the direction and with the approval of the Attorney-General of the United States, such rooms in the public buildings of the United States as may be necessary

for the Court's use; but in case proper rooms can not be provided in such public buildings, said marshals, with the approval of the Attorney-General of the United States, may then lease from time to time other necessary rooms for the Court.

[Assignment of judges.]

If, at any time, the business of the Commerce Court does not require the services of all the judges, the Chief Justice of the United States may, by writing, signed by him and filed in the Department of Justice, terminate the assignment of any of the judges or temporarily assign him for service in any circuit court or circuit court of appeals. In case of illness or other disability of any judge assigned to the Commerce Court the Chief Justice of the United States may assign any other circuit judge of the United States to act in his place, and may terminate such assignment when the exigence therefor shall cease; and any circuit judge so assigned to act in place of such judge shall, during his assignment, exercise all the powers and perform all the functions of such judge.

[Other powers of the commerce court.]

In all cases within its jurisdiction the Commerce Court, and each of the judges assigned thereto, shall, respectively, have and may exercise any and all of the powers of a circuit court of the United States and of the judges of said Court, respectively, so far as the same may be appropriate to the effective exercise of the jurisdiction hereby conferred. The Commerce Court may issue all writs and process appropriate to the full exercise of its jurisdiction and powers and may prescribe the form thereof. It may also, from time to time, establish such rules and regulations, concerning pleading, practice, or procedure in cases of matters within its jurisdiction as to the court shall seem wise and proper. Its orders, writs, and process may run, be served, and be returnable anywhere in the United States; and the marshal and deputy marshal of said Court and also the United States marshals and deputy marshals in the several districts of the United States shall have like powers and be under like duties to act for and in behalf of said court as pertain to United States marshals and deputy marshals generally when acting under like conditions concerning suits or matters in the circuits of the United States.

[How jurisdiction invoked.]

The jurisdiction of the Commerce Court shall be invoked by filing in the office of the clerk of the Court a written petition setting forth briefly and succinctly the facts constituting the peti-

[Petition.]

tioner's cause of action, and specifying the relief sought. A copy of such petition shall be forthwith served by the marshal or a deputy marshal of the Commerce Court or by the proper United States marshal or deputy marshal upon every defendant therein named, and when the United States is a party defendant, the

service shall be made by filing a copy of said petition in the office of the secretary of the Interstate Commerce Commission and in the Department of Justice. Within thirty days after the petition is served, unless that time is extended by order of the court

[Answer.]

or a judge thereof, an answer to the petition shall be filed in the clerk's office, and a copy thereof mailed to the petitioner's attorney, which answer shall briefly and categorically respond to

[Replication.]

the allegations of the petition. No replication need be filed to the answer, and objections to the sufficiency of the petition or answer as not setting forth a cause of action or defense must be taken at the final hearing or by motion to dismiss the petition based on said grounds, which motion may be made at any time before answer is filed. In case no answer shall be filed as provided herein the petitioner may apply to the Court on notice for such relief as may be proper upon the facts alleged in the petition.

[Practice and procedure.]

The Court may, by rule, prescribe the method of taking evidence in cases pending in said court; and may prescribe that the evidence be taken before a single judge of the court, with power to rule upon the admission of evidence. Except as may be otherwise provided in this Act, or by rule of the Court, the practice and procedure in the Commerce Court shall conform as nearly as may be to that in like cases in a circuit court of the United States.

[When open for business.]

The Commerce Court shall be opened for the transaction of business at a date to be fixed by order of the said Court, which shall be not later than thirty days after the judges thereof shall have been designated.

[Appeals to supreme court.]

(SEC. 2.) That a final judgment or decree of the Commerce Court may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of said final judgment or decree. Such appeal may be taken in like manner as appeals from a circuit court of the United States to the Supreme Court, and the Commerce Court may direct the original record to be transmitted on appeal instead of a transcript thereof. The Supreme Court may affirm, reverse, or modify the final judgment or decree of the Commerce Court as the case may require.

[Supersedeas.]

Appeal to the Supreme Court, however, shall in no case supersede or stay the judgment or decree of the Commerce Court appealed from, unless the Supreme Court or a justice thereof shall so direct, and appellant shall give bond in such form and of such amount as the Supreme Court, or the justice of that court allowing the stay, may require.

[Appeals from interlocutory orders.]

An appeal may also be taken to the Supreme Court of the United States from an interlocutory order or decree of the Commerce Court granting or continuing an injunction restraining the enforcement of an order of the Interstate Commerce Commission, provided such appeal be taken within thirty days from the entry of such order or decree.

[Priority in supreme court.]

Appeals to the Supreme Court under this section shall have priority in hearing and determination over all other causes except criminal causes in that court.

[Suits to enjoin orders of commission.]

(SEC. 3.) That suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought in the Commerce Court against the United States. The pendency of such suit shall not of itself stay or suspend the operation of the order of the Interstate Commerce Commission; but the Commerce Court, in its discretion, may restrain or suspend, in whole or in part, the operation of the Commission's order pending the

[Notice.]

final hearing and determination of the suit. No order or injunction so restraining or suspending an order of the Interstate Commerce Commission shall be made by the Commerce Court otherwise than upon notice and after hearing, except that in cases where irreparable damage would otherwise ensue to the petitioner, said Court, or a judge thereof, may, on hearing, after not less than three days' notice to the Interstate Commerce Commis-

[Temporary stay.]

sion and the Attorney-General, allow a temporary stay or suspension in whole or in part of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the order of such Court or judge, pending application to the Court for its order or injunction, in which case the said order shall contain a specific finding, based upon evidence submitted to the judge making the order and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damage. The Court may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension in whole or in part until its decision upon the application.

[Suits to be brought by or against United States.]

(SEC. 4.) That all cases and proceedings in the Commerce Court which but for this Act would be brought by or against the Interstate Commerce Commission shall be brought by or against the United States, and the United States may intervene in any case or proceeding in the Commerce Court whenever, though it has not been made a party, public interests are involved.

(SEC. 5.) That the Attorney-General shall have charge and

[Attorney-general to have control of suits.]

control of the interests of the Government in all cases and proceedings in the Commerce Court, and in the Supreme Court of the United States upon appeal from the Commerce Court; and if in his opinion the public interest requires it, he may retain and employ in the name of the United States, within the appropriations from time to time made by the Congress for such pur-

[Special attorneys.]

poses, such special attorneys and counselors at law as he may think necessary to assist in the discharge of any of the duties incumbent upon him and his subordinate attorneys; and the Attorney-General shall stipulate with such special attorneys and counsel the amount of their compensation, which shall not be in excess of the sums appropriated therefor by Congress for such

[Commission and others may be represented.]

purposes, and shall have supervision of their action: *Provided*, That the Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties thereto of their own motion and as of right, and be represented by their counsel, in any suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party; and the Court wherein is pending such suit may make all such rules and orders as to such appearances and representations, the number of counsel, and all matters of procedure, and otherwise, as to subserve the ends of justice and speed the determination of such suits: *Provided further*, That communities, associations, corporations, firms, and indi-

[Parties who may intervene.]

viduals who are interested in the controversy or question before the Interstate Commerce Commission, or in any suit which may be brought by anyone under the terms of this Act, or the Acts of which it is amendatory or which are amendatory of it, relating to action of the Interstate Commerce Commission, may intervene in said suit or proceedings at any time after the institution thereof, and the Attorney-General shall not dispose of or discontinue said suit or proceeding over the objection of such party or intervenor aforesaid, but said intervenor or intervenors may prosecute, defend, or continue said suit or proceeding unaffected by the action or nonaction of the Attorney-General of the United States therein.

[Complainants before commission may intervene.]

Complainants before the Interstate Commerce Commission interested in a case shall have the right to appear and be made parties to the case and be represented before the courts by counsel under such regulations as are now permitted in similar circumstances under the rules and practice of equity courts of the United States.

[Pending and other proceedings.]

(SEC. 6.) That until the opening of the Commerce Court as in section one hereof provided, all cases and proceedings of which from that time the Commerce Court is hereby given exclusive jurisdiction may be brought in the same courts and conducted in like manner and with like effect as is now provided by law; and if any such case or proceeding shall have gone to final judgment or decree before the opening of the Commerce Court, appeal may be taken from such final judgment or decree in like manner and with like effect as is now provided by law. Any such case or proceeding within the jurisdiction of the Commerce Court which may have been begun in any other court as hereby allowed before

[Transference of cases to commerce court.]

the said date shall be forthwith transferred to the Commerce Court, if it has not yet proceeded to final judgment or decree in such other court unless it has been finally submitted for the decision of such Court, in which case the cause shall proceed in such Court to final judgment or decree and further proceeding thereafter, and appeal may be taken direct to the Supreme Court, and if remanded such cause may be sent back to the court from which the appeal was taken or to the Commerce Court for further proceeding as the Supreme Court shall direct; and all previous proceedings in such transferred case shall stand and operate notwithstanding the transfer, subject to the same control over them by the Commerce Court and to the same right of subsequent action in the case or proceeding as if the transferred case or proceeding had been originally begun in the Commerce Court. The clerk of the Court from which any case or proceeding is so transferred to the Commerce Court shall transmit to and file in the Commerce Court the originals of all papers filed in such case or proceeding and a certified transcript of all record entries in the case or proceeding up to the time of transfer.

[Carriers must designate agents in Washington for purposes of service.]

It shall be the duty of every common carrier subject to the provisions of this Act, within sixty days after the taking effect of this Act, to designate in writing an agent in the city of Washington, District of Columbia, upon whom service of all notices and processes may be made for and on behalf of said common carrier in any proceeding or suit pending before the Interstate Commerce Commission or before said Commerce Court, and to file such designation in the office of the secretary of the Interstate Commerce Commission, which designation may from time to time

[Service on such agents.]

be changed by like writing similarly filed; and thereupon service of all notices and processes may be made upon such common carrier by leaving a copy thereof with such designated agent at his office or usual place of residence in the city of Washington, with like effect as if made personally upon such common carrier,

and in default of such designation of such agent, service of any notice or other process in any proceeding before said Interstate Commerce Commission or Commerce Court may be made by posting such notice or process in the office of the secretary of the Interstate Commerce Commission.

[Pending cases.]

(SEC. 15.) That nothing in this Act contained shall undo or impair any proceedings heretofore taken by or before the Interstate Commerce Commission or any of the Acts of said Commission; and in any cases, proceedings, or matters now pending before it, the Commission may exercise any of the powers hereby conferred upon it, as would be proper in cases, proceedings, or matters hereafter initiated; and nothing in this Act contained shall operate

[Existing liabilities.]

to release or affect any obligation, liability, penalty, or forfeiture heretofore existing against or incurred by any person, corporation, or association.

[Special commission to investigate issue of stocks and bonds created.]

(SEC. 16.) That the President is hereby authorized to appoint a commission to investigate questions pertaining to the issuance of stocks and bonds by railroad corporations, subject to the provisions of the Act to regulate commerce, and the power of Congress to regulate or affect the same, and to fix the compensation of the members of such commission. Said commission shall be and is hereby authorized to employ experts to aid in the work of

[Clerks and employees.]

inquiry and examination, and such clerks, stenographers, and other assistants as may be necessary, which employees shall be paid such compensation as the commission may deem just and reasonable, upon a certificate to be issued by the chairman of the commission. The several departments and bureaus of the Government shall detail from time to time such officials and employees and furnish such information to the commission as may be directed by the President. For the purposes of its investigations the commission shall be authorized to incur and have paid

[Expenses.]

upon the certificate of its chairman such expenses as the commission shall deem necessary: *Provided, however,* That the total expenses authorized or incurred under the provisions of this section for compensation, employees, or otherwise, shall not exceed the sum of twenty-five thousand dollars.

[Interlocutory injunctions restraining enforcement of state statutes limited.]

(SEC. 17.) That no interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute shall be issued or granted by any justice of the supreme court, or by any

circuit court of the United States, or by any judge thereof, or by any district judge acting as circuit judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit judge, or to a district judge acting as circuit judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court of the United States or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. Whenever such application as aforesaid is presented to a justice of the Supreme Court of the United States, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges: *Provided, however,* That one of such three judges shall be a justice of the Supreme Court of the United States or a circuit judge. Said application

[Notice.]

shall not be heard or determined before at least five days' notice of the hearing has been given to the governor and to the attorney-general of the State, and to such other persons as may be defendants in the suit: *Provided,* That if of opinion that irreparable loss or damage would result to the complainant unless a temporary restraining order is granted, any justice of the Supreme Court of the United States, or any circuit or district judge, may grant such temporary restraining order at any time before such hearing and determination of the application for an interlocutory injunction, but such temporary restraining order shall only remain in force until the hearing and determination of the appli-

[Expedition.]

cation for an interlocutory injunction upon notice as aforesaid. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after

[Appeals.]

the expiration of the notice hereinbefore provided for. An appeal may be taken directly to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case.

THE NATIONAL TRADE UNION INCORPORATION ACT.

The National Trade Union Incorporation Act.—The Act of June 29, 1886, legalizes the incorporation of National Trades Unions, 3 Compiled Statutes 3204:

“National Trade Unions” defined.—*Be it enacted, etc.:* SEC. 1. That the term “National Trade Union,” in the meaning of this act, shall signify an association of working people having two or more branches in the States or Territories of the United States for the purpose of aiding its members to become more skillful and efficient workers, the promotion of their general intelligence, the elevation of their character, the regulation of their wages and their hours and conditions of labor, the protection of their individual rights in the prosecution of their trade or trades, the raising of funds for the benefit of sick, disabled, or unemployed members, or the families of deceased members, or for such other object or objects for which working people may lawfully combine, having in view their mutual protection or benefit.

Incorporation.—SEC. 2. That National Trade Unions shall upon filing their articles of incorporation in the office of the recorder of the District of Columbia, become a corporation under the technical name by which said National Trade Union desires to be known to the trade; and shall have the right to sue and be sued, to implead and be impleaded, to grant and receive, in its corporate or technical name, property, real, personal, and mixed, and to use said property and the proceeds and income thereof, for the objects of said corporation as in its charter defined: *Provided*, That each Union shall hold only so much real estate as may be required for the immediate purposes of its corporation.

Constitution, rules, and by-laws.—SEC. 3. That an incorporated National Trade Union shall have power to make and establish such constitution, rules, and by-laws as it may deem proper to carry out its lawful objects, and the same to alter, amend, add to, or repeal at pleasure.

Duties of officers.—SEC. 4. That an incorporated National Trade Union shall have power to define the duties and powers of all its officers, and prescribe their mode of election and term of office, to establish branches and sub-unions in any territory of the United States.

Headquarters.—SEC. 5. That the headquarters of an incorporated National Trade Union shall be located in the District of Columbia. See *supra*, § 67.

NATIONAL ARBITRATION ACT.

AN ACT Concerning carriers engaged in interstate commerce and their employees.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of this Act shall apply to any common carrier or car-

[Adjustment of controversies between railroads and their employees.]

[Scope of act.]

riers and their officers, agents, and employees, except masters of vessels and seamen, as defined in section forty-six hundred and twelve, Revised Statutes of the United States, engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water, for a continuous carriage or shipment, from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States.

[Terms.]

The term "railroad" as used in this Act shall include all bridges and ferries used or operated in connection with any

[—"railroads."]

railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract,

[—"transportation."]

agreement, or lease; and the term "transportation" shall include all instrumentalities of shipment or carriage.

[—"employees."]

The term "employees" as used in this Act shall include all persons actually engaged in any capacity in train operation or train service of any description, and notwithstanding that the cars upon or in which they are employed may be held and operated by the carrier under lease or other contract. *Provided, how-*

[Street railroads excepted.]

ever, That this Act shall not be held to apply to employees of street railroads and shall apply only to employees engaged in railroad train service. In every such case the carrier shall be responsible for the acts and defaults of such employees in the same manner and to the same extent as if said cars were owned by it and said employees directly employed by it, and any provisions to the contrary of any such lease or other contract shall

[Responsibility of carrier on leased cars.]

be binding only as between the parties thereto and shall not affect the obligations of said carrier either to the public or to the private parties concerned.

SEC. 2. That whenever a controversy concerning wages, hours of labor, or conditions of employment shall arise between a car-

[Chairman of Interstate Commerce Commission and commissioner of labor to mediate differences.]

rier subject to this Act and the employees of such carrier, seriously interrupting or threatening to interrupt the business of said carrier, the chairman of the Interstate Commerce Commission and the Commissioner of Labor shall, upon the request of either party to the controversy, with all practicable expedition, put themselves in communication with the parties to such controversy, and shall use their best efforts, by mediation and conciliation, to amicably settle the same; and if such efforts shall be unsuccessful, shall at once endeavor to bring about an arbitration of said controversy in accordance with the provisions of this Act.

[Failure to adjust.]

SEC. 3. That whenever a controversy shall arise between a carrier subject to this Act and the employees of such carrier which can not be settled by mediation and conciliation in the manner provided in the preceding section, said controversy may be submitted to the arbitration of a board of three persons, who shall

[Board to arbitrate. How selected.]

be chosen in the manner following: One shall be named by the carrier or employer directly interested; the other shall be named by the labor organization to which the employees directly interested belong, or, if they belong to more than one, by that one of them which specially represents employees of the same grade and class and engaged in services of the same nature as said employees so directly interested: *Provided, however,* That when a

[Controversies affecting different labor organizations.]

controversy involves and affects the interests of two or more classes and grades of employees belonging to different labor organizations, such arbitrator shall be agreed upon and designated by the concurrent action of all such labor organizations; and in cases where the majority of such employees are not members of any labor organization, said employees may by a majority vote select a committee of their own number, which committee shall

[Third arbitrator.]

have the right to select the arbitrator on behalf of said employees. The two thus chosen shall select the third Commissioner of arbitration; but, in the event of their failure to name such arbitrator within five days after their first meeting, the third arbitrator shall be named by the Commissioners named in the preceding section. A majority of said arbitrators shall be competent to make a valid and binding award under the provisions hereof.

[Form of submission.]

The submission shall be in writing, shall be signed by the employer and by the labor organization representing the employees, shall specify the time and place of meeting of said board of arbitration, shall state the questions to be decided, and shall contain appropriate provisions by which the respective parties shall stipulate, as follows:

[Stipulations of submission.]**[Time of hearings.]**

First. That the board of arbitration shall commence their hearings within ten days from the date of the appointment of the third arbitrator, and shall find and file their award, as provided in this section, within thirty days from the date of the ap-

[Status of controversy pending arbitration.]

pointment of the third arbitrator; and that pending the arbitration the status existing immediately prior to the dispute shall

[Involuntary service.]

not be changed: *Provided*, That no employee shall be compelled to render personal service without his consent.

[Filing of award in the United States circuit court.]

Second. That the award and the papers and proceedings, including the testimony relating thereto certified under the hands of the arbitrators and which shall have the force and effect of a bill of exceptions, shall be filed in the clerk's office of the circuit court of the United States for the district wherein the controversy arises or the arbitration is entered into and shall be final and conclusive upon both parties, unless set aside for error of law apparent on the record.

[Enforcing award.]

Third. That the respective parties to the award will each faithfully execute the same, and that the same may be specifically enforced in equity so far as the powers of a court of equity permit:

[Involuntary service.]

Provided, That no injunction or other legal process shall be issued which shall compel the performance by any laborer against his will of a contract for personal labor or service.

[Notice of termination of service.]

Fourth. That employees dissatisfied with the award shall not by reason of such dissatisfaction quit the service of the employer before the expiration of three months from and after the making of such award without giving thirty days' notice in writing of their intention so to quit. Nor shall the employer dissatisfied with such award dismiss any employee or employees on account of such dissatisfaction before the expiration of three months from and after the making of such award without giving thirty days' notice in writing of his intention so to discharge.

[Continuance in force of award.]

Fifth. That said award shall continue in force as between the parties thereto for the period of one year after the same shall go

into practical operation, and no new arbitration upon the same subject between the same employer and the same class of employees shall be had until the expiration of said one year if the award is not set aside as provided in section four. That as to

[Individual employees not parties not bound by award.]

individual employees not belonging to the labor organization or organizations which shall enter into the arbitration, the said arbitration and the award made therein shall not be binding, unless the said individual employees shall give assent in writing to become parties to said arbitration.

[Exceptions to award.]

SEC. 4. That the award being filed in the clerk's office of a circuit court of the United States, as hereinbefore provided, shall go into practical operation, and judgment shall be entered thereon accordingly at the expiration of ten days from such filing, unless within such ten days either party shall file exceptions thereto for matter of law apparent upon the record, in which case said award shall go into practical operation and judgment be entered accordingly when such exceptions shall have been finally disposed of either by said circuit court or on appeal therefrom.

[Appeal to circuit court of appeals.]

At the expiration of ten days from the decision of the circuit court upon exceptions taken to said award, as aforesaid, judgment shall be entered in accordance with said decision unless during said ten days either party shall appeal therefrom to the circuit court of appeals. In such case only such portion of the

[Record.]

record shall be transmitted to the appellate court as is necessary to the proper understanding and consideration of the questions of law presented by said exceptions and to be decided.

[Judgment.]

The determination of said circuit court court of appeals upon said questions shall be final, and being certified by the clerk thereof to said circuit court, judgment pursuant thereto shall thereupon be entered by said circuit court.

If exceptions to an award are finally sustained, judgment shall be entered setting aside the award. But in such case the parties

[Judgment by agreement.]

may agree upon a judgment to be entered disposing of the subject-matter of the controversy, which judgment when entered shall have the same force and effect as judgment entered upon an award.

[Powers of arbitration.]

SEC. 5. That for the purposes of this Act the arbitrators herein provided for, or either of them, shall have power to administer oaths and affirmations, sign subpoenas, require the attendance and testimony of witnesses, and the production of such books,

papers, contracts, agreements, and documents material to a just determination of the matters under investigation as may be ordered by the court; and may invoke the aid of the United States courts to compel witnesses to attend and testify and to produce such books, papers, contracts, agreements and documents to the same extent and under the same conditions and penalties as is provided for in the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, and the amendments thereto.

[Agreement to arbitrate.]

SEC. 6. That every agreement of arbitration under this Act shall be acknowledged by the parties before a notary public or clerk of a district or circuit court of the United States, and when so acknowledged a copy of the same shall be transmitted to the

[Filing of agreement in office of Interstate Commerce Commission.]

chairman of the Interstate Commerce Commission, who shall file the same in the office of said Commission.

[Agreement of individual employees to arbitrate.]

Any agreement of arbitration which shall be entered into conforming to this Act, except that it shall be executed by employees individually instead of by a labor organization as their representative, shall, when duly acknowledged as herein provided, be transmitted to the chairman of the Interstate Commerce Commission, who shall cause a notice in writing to be served upon the

[Meeting to be called.]

arbitrators, fixing a time and place for a meeting of said board, which shall be within fifteen days from the execution of said agreement of arbitration: *Provided, however,* That the said chairman of the Interstate Commerce Commission shall decline to call

[Condition.]

a meeting of arbitrators under such agreement unless it be shown to his satisfaction that the employees signing the submission represent or include a majority of all employees in the service of the same employer and of the same grade and class, and that an award pursuant to said submission can justly be regarded as binding upon all such employees.

[Restrictions on parties during pendency of arbitration.]

SEC. 7. That during the pendency of arbitration under this Act it shall not be lawful for the employer, party to such arbitration, to discharge the employees, parties thereto, except for inefficiency, violation of law, or neglect of duty; nor for the organization representing such employees to order, nor for the employees to unite in, aid, or abet, strikes against said employer; nor, during a

[After award.]

period of three months after an award under such an arbitration, for such employer to discharge any such employees, except for the causes aforesaid, without giving thirty days' written notice of an intent so to discharge; nor for any of such employees, during

a like period, to quit the service of said employer without just cause, without giving to said employer thirty days' written notice of an intent so to do; nor for such organization representing such employees to order, counsel, or advise otherwise. Any viola-

[Penalty.]

tion of this section shall subject the offending party to liability for damages: *Provided*, That nothing herein obtained shall be

[Reduction of force for business reasons.]

construed to prevent any employer, party to such arbitration, from reducing the number of its or his employees whenever in its or his judgment business necessities require such reduction.

[National trade unions.]

SEC. 8. That in every incorporation under the provisions of chapter five hundred and sixty-seven of the United States Statutes of eighteen hundred and eighty-five and eighteen hundred

[Forfeiture of membership for violence.]

and eighty-six it must be provided in the article of incorporation and in the constitution, rules, and by-laws that a member shall cease to be such by participating in or by instigating force or violence, against persons or property during strikes, lockouts, or boycotts, or by seeking to prevent others from working through violence, threats or intimidations. Members of such incorpora-

[Liabilities.]

tions shall not be personally liable for the acts, debts, or obligations of the corporations, nor shall such corporations be liable for

[Appearance of corporations in arbitration proceedings.]

the acts of members or others in violation of law; and such corporations may appear by designated representatives before the board created by this Act, or in any suits or proceedings for or against such corporations or their members in any of the federal courts.

[Railroads in hands of federal receiver. Employees to be heard.]

SEC. 9. That whenever receivers appointed by federal courts are in the possession and control of railroads, the employees upon such railroads shall have the right to be heard in such courts upon all questions affecting the terms and conditions of their employment, through the officers and representatives of their associations, whether incorporated or unincorporated, and no reduction of wages shall be made by such receivers without the authority of the court therefor upon notice to such employees, said notice to

[Notice of reduction of wages.]

be not less than twenty days before the hearing upon the receivers' petition or application, and to be posted upon all customary bulletin boards along or upon the railway operated by such receiver or receivers.

[Prohibition of unjust requirements as conditions to employment.]

SEC. 10. That any employer subject to the provisions of this Act and any officer, agent, or receiver of such employer who shall

require any employee, or any person seeking employment, as a condition of such employment, to enter into an agreement, either written or verbal, not to become or remain a member of any labor corporation, association, or organization; or shall threaten any employee with loss of employment, or shall unjustly discriminate against any employee because of his membership in such a labor corporation, association, or organization; or who shall require any employee or any person seeking employment, as a condition of such employment, to enter into a contract whereby such employee or applicant for employment shall agree to contribute to

[Attempts to prevent further employment after discharge.]

any fund for charitable, social, or beneficial purposes; to release such employer from legal liability for any personal injury by reason of any benefit received from such fund beyond the proportion of the benefit arising from the employer's contribution to such fund; or who shall, after having discharged an employee, attempt or conspire to prevent such employee from obtaining employment, or who shall, after the quitting of an employee, attempt or conspire to prevent such employee from obtaining employment, is hereby declared to be guilty of a misdemeanor, and

[Penalty.]

upon conviction thereof in any court of the United States of competent jurisdiction in the district in which such offense was committed, shall be punished for each offense by a fine of not less than one hundred dollars and not more than one thousand dollars.

[Appropriation for expenses of arbitration.]

SEC. 11. That each member of said board of arbitration shall receive a compensation of ten dollars per day for the time he is actually employed, and his traveling and other necessary expenses; and a sum of money sufficient to pay the same, together with the traveling and other necessary and proper expenses of any conciliation or arbitration had hereunder, not to exceed ten thousand dollars in any one year, to be approved by the chairman of the Interstate Commerce Commission and audited by the proper accounting officers of the Treasury, is hereby appropriated for the fiscal years ending June thirtieth, eighteen hundred and ninety-eight, and June thirtieth, eighteen hundred and ninety-nine, out of any money in the Treasury not otherwise appropriated.

[Repeal.]

SEC. 12. That the Act to create boards of arbitration or commission for settling controversies and differences between railroad corporations and other common carriers engaged in interstate or territorial transportation of property or persons and their employees, approved October first, eighteen hundred and eighty-eight, is hereby repealed.

Public, No. 115, approved June 1, 1898.

INTERLOCKING ACT.

AN ACT To grant the right of way through the Oklahoma Territory and the Indian Territory to the Enid and Anadarko Railway Company, and for other purposes.

SEC. 18. That when in any case two or more railroads crossing each other at a common grade shall, by a system of interlocking or automatic signals, or by any works or fixtures to be erected by them, render it safe for engines and trains to pass over such crossing without stopping, and such interlocking or automatic signals

[Approval by commission of interlocking or automatic signals at crossings.]

or works or fixtures shall be approved by the Interstate Commerce Commissioners, then, in that case, it is hereby made lawful for the engines and trains of such railroad or railroads to pass over such crossing without stopping, any law or the provisions of any law to the contrary notwithstanding; and when two or more railroads cross each other at a common grade, either of such roads may apply to the Interstate Commerce Commissioners for permission to introduce upon both of said railroads some system of interlocking or automatic signals or works or fixtures rendering it safe for engines and trains to pass over such crossings without

[Common grade crossing.]

stopping, and it shall be the duty of said Interstate Commerce Commissioners, if the system of works and fixtures which it is proposed to erect by said company, are, in the opinion of the Commission, sufficient and proper, to grant such permission.

[Notice of intent to use signals at crossings.]

SEC. 19. That any railroad company which has obtained permission to introduce a system of interlocking or automatic signals at its crossing at a common grade with any other railroad,

[Division of cost.]

as provided in the last section, may, after thirty days' notice, in writing, to such other railroad company, introduce and erect such interlocking or automatic signal or fixtures; and if such railroad company, after such notification, refuse to join with the railroad company giving notice in the construction of such works or fixtures, it shall be lawful for said company to enter upon the right of way and tracks of such second company, in such manner as to not unnecessarily impede the operation of such road, and erect such works and fixtures, and may recover in any action at law from such second company one-half of the total cost of erecting and maintaining such interlocking or automatic signals or works or fixtures on both of said roads.

* * * * *

Public, No. 26, approved February 28, 1902.

ASH PAN ACT.

AN ACT To promote the safety of employees on railroads.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That on and

[Ash-pan equipment in interstate commerce.]

after the first day of January, nineteen hundred and ten, it shall be unlawful for any common carrier engaged in interstate or foreign commerce by railroad to use any locomotive in moving interstate or foreign traffic, not equipped with an ash pan, which can be dumped or emptied and cleaned without the necessity of any employee going under such locomotive.

[Ash-pan equipment in territories and district of Columbia.]

SEC. 2. That on and after the first day of January, nineteen hundred and ten, it shall be unlawful for any common carrier by railroad in any Territory of the United States or the District of Columbia to use any locomotive not equipped with an ash pan which can be dumped or emptied and cleaned without the necessity of any employee going under such locomotive.

[Penalties.]

SEC. 3. That any such common carrier using any locomotive in violation of any of the provisions of this Act shall be liable to a penalty of two hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have

[Enforcement.]

been committed; and it shall be the duty of such district attorney to bring such suits upon duly verified information being lodged

[Commission to lodge information.]

with him of such violation having occurred; and it shall also be the duty of the Interstate Commerce Commission to lodge with the proper district attorneys information of any such violations as may come to its knowledge.

[Powers granted to commission.]

SEC. 4. That it shall be the duty of the Interstate Commerce Commission to enforce the provisions of this Act, and all powers heretofore granted to said Commissions are hereby extended to it for the purpose of the enforcement of this Act.

[Receivers included.]

SEC. 5. That the term "common carrier" as used in this Act shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

[When ash-pan is not necessary.]

SEC. 6. That nothing in this Act contained shall apply to any locomotive upon which, by reason of the use of oil, electricity, or other such agency, an ash pan is not necessary.

Public, No. 165, approved May 30, 1908.

REPORTS OF ACCIDENTS ACT.

AN ACT Requiring common carriers engaged in interstate and foreign commerce to make full reports of all accidents to the Interstate Commerce Commission, and authorizing investigations thereof by said Commission.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it

[Monthly reports of railway accidents.]

shall be the duty of the general manager, superintendent, or other proper officer of every common carrier engaged in interstate or foreign commerce by railroad to make to the Interstate Commerce Commission, at its office in Washington, District of Columbia, a monthly report, under oath, of all collisions, derailments, or other accidents resulting in injury to persons, equipment, or roadbed arising from the operation of such railroad under such rules and regulations as may be prescribed by the said Commission, which report shall state the nature and causes thereof and the circumstances connected therewith: *Provided*, That hereafter all said carriers shall be relieved from the duty of reporting accidents in their annual financial and operating reports made to the Commission.

[Failure to make report within thirty days after end of any month a misdemeanor.]

SEC. 2. That any common carrier failing to make such report within thirty days after the end of any month shall be deemed guilty of a misdemeanor, and upon conviction thereof by a court

[Penalty.]

of competent jurisdiction shall be punished by a fine of not more than one hundred dollars for each and every offense and for every day during which it shall fail to make such report after the time herein specified for making the same.

[Power of the commission to investigate accidents.]

SEC. 3. That the Interstate Commerce Commission shall have authority to investigate all collisions, derailments, or other accidents resulting in serious injury to person or to the property of a railroad occurring on the line of any common carrier engaged in interstate or foreign commerce by railroad. The Commission, or any impartial investigator thereunto authorized by said Commission, shall have authority to investigate such collisions, derailments, or other accidents aforesaid, and all the attending facts,

[Taking of testimony.]

conditions, and circumstances, and for that purpose may subpoena witnesses, administer oaths, take testimony, and require the production of books, papers, orders, memoranda, exhibits, and

other evidence, and shall be provided by said carriers with all

[State commissions.]

reasonable facilities: *Provided*, That when such accident is investigated by a commission of the State in which it occurred, the Interstate Commerce Commission shall, if convenient, make any investigation it may have previously determined upon, at the

[Reports of investigations.]

same time as, and in connection with the state commission investigation. Said Commission shall, when it deems it to the public interest, make reports of such investigations, stating the cause of accident, together with such recommendations as it deems proper. Such reports shall be made public in such manner as the Commission deems proper.

[Reports not to be used in evidence against carrier.]

SEC. 4. That neither said report nor any report of said investigation nor any part thereof shall be admitted as evidence or used for any purpose in any suit or action for damages growing out of any matter mentioned in said report or investigation.

[Form of report.]

SEC. 5. That the Interstate Commerce Commission is authorized to prescribe for such common carriers a method and form for making the reports hereinbefore provided.

[Repeal of prior act.]

SEC. 6. That the Act entitled "An Act requiring common carriers engaged in interstate commerce to make full reports of all accidents to the Interstate Commerce Commission," approved March third, nineteen hundred and one, is hereby repealed.

["Interstate commerce" and "foreign commerce" defined.]

SEC. 7. That the term "interstate commerce," as used in this Act, shall include transportation from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, and the term "foreign commerce," as used in this Act, shall include transportation from any State or Territory or the District of Columbia to any foreign country and from any foreign country to any State or Territory or the District of Columbia.

[When act effective.]

SEC. 8. That this Act shall take effect sixty days after its passage.

Public, No. 165, approved, May 6, 1910.

INTERSTATE COMMERCE COMMISSION.

RULES

OF

PRACTICE BEFORE THE COMMISSION

IN

CASES AND PROCEEDINGS

UNDER

THE ACT TO REGULATE COMMERCE.

REVISED, AMENDED AND ADOPTED
January 14, 1911.

RULES OF PRACTICE BEFORE THE COMMISSION IN CASES AND PROCEEDINGS UNDER THE ACT TO REGULATE COMMERCE.

I.

PUBLIC SESSIONS.

The general sessions of the Commission for hearing contested cases, including oral argument, will be held at its office in the American Bank Building, No. 1317 F street NW., Washington, D. C., and the two weeks beginning with the first Monday in each month are set aside for that purpose.

Special sessions may be held at other places as ordered by the commission.

II.

PARTIES TO CASES.

Any person, firm, company, corporation, or association, mercantile, agricultural, or manufacturing society, body politic or municipal organization, or any common carrier, or the railroad commissioner or commission of any State or Territory, may complain to the commission by petition, of anything done, or omitted to be done, in violation of the provisions of the act to regulate commerce by any common carrier or carriers or other parties subject to the provisions of said act. Where a complaint relates to the rates, regulations, or practices of a single carrier, no other carrier need be made a party, but if it relates to matters in which two or more carriers, engaged in transportation by continuous carriage or shipment, are interested, the several carriers participating in such carriage or shipment are proper parties defendant.

Where a complaint relates to rates, regulations, or practices of carriers operating different lines, and the object of the proceeding is to secure correction of such rates, regulations or practices on each of said lines, all the carriers operating such lines must be made defendants.

When the line of a carrier is operated by a receiver or trustee, both the carrier and its receiver or trustee should be made defendants in cases involving transportation over such line.

Persons or carriers not parties may petition in any proceeding for leave to intervene and be heard therein. Such petition shall set forth the petitioner's interest in the proceeding. Leave granted on such application shall entitle the intervener to appear and be treated as a party to the proceeding, but no person not a carrier who intervenes in behalf of the defense shall have the right to file an answer or otherwise become a party, except to have notice of and appear at the taking of testimony, produce and cross-examine witnesses, and be heard, in person or by counsel, on the argument of the case.

III.

COMPLAINTS.

Complaints must be by petition setting forth briefly the facts claimed to constitute a violation of the law. The corporate name of the carrier or carriers complained against must be stated in full, and the address of the petitioner, with the name and address of his attorney or counsel, if any, must appear upon the petition. The petition need not be verified. The complainant must furnish as many copies of the petition as there may be parties complained against to be served and three additional copies for the use of the commission.

The commission will cause a copy of the petition, with notice to satisfy or answer the same within a specified time, to be served personally upon the properly designated agent of each defendant, or, in the absence of such designated agent, by posting in the office of the secretary of the commission.

Complaints which involve the same or substantially the same principle, subject, or state of facts, even though two or more rates or regulations are alleged to be unreasonable or discriminatory and numerous shipments are affected thereby should be included in one complaint; in which the several rates, regulations, discriminations, and shipments are set out in items, exhibits, or paragraphs. Two or more complainants may join in one complaint against one or more carriers, and one complainant's complaints against two or more carriers may be included in one complaint, when the subject of complaint, the principle involved, or the state of facts is substantially the same. In other words, two or more complaints should not be filed when one complaint can be made fairly to cover the subject, the principle, or the facts.

IV.

ANSWERS.

A defendant must answer within twenty days from the date of the notice above provided for, but the commission may, in a particular case, require the answer to be filed within a shorter time. The time prescribed in any case may be extended, upon good cause shown, by the commission. The original answer must be filed with the secretary of the commission at its office in Washington, and a copy thereof at the same time served by the defendant, personally or by mail, upon the complainant, who must forthwith notify the secretary of its receipt. The answer must specifically admit or deny the material allegations of the petition, and also set forth the facts which will be relied upon to support any such denial. If a defendant shall make satisfaction before answering, a written acknowledgement thereof, showing the character and extent of the satisfaction given, must be filed by the complainant, and in that case the fact and manner of satisfaction, without other matter, may be set forth in the answer. If satisfaction be made after the filing and service of an answer, such written acknowledgement must also be filed by the complainant, and a supplemental answer setting forth the fact and manner of satisfaction must be filed by the defendant.

V.

NOTICE IN NATURE OF DEMURRER.

A defendant who deems the petition insufficient to show a breach of legal duty may, instead of answering or formally demurring, serve on the complainant notice of hearing on the petition; and in such case the facts stated in the petition will be deemed admitted. A copy of the notice must at the same time be filed with the secretary of the commission. The filing of an answer, however, will not be deemed an admission of the sufficiency of the petition, but a motion to dismiss for insufficiency may be made at the hearing.

VI.

SERVICE OF PAPERS.

Copies of notices or other papers must be served upon the adverse party or parties, personally or by mail, and when any

party has appeared by attorney service upon such attorney shall be deemed proper service upon the party.

VII.

AMENDMENTS.

Upon application of any party, amendments to any petition or answer, in any proceeding or investigation, may be allowed by the commission, in its discretion.

VIII.

ADJOURNMENTS AND EXTENSIONS OF TIME.

Adjournments and extensions of time may be granted upon the application of any party, in the discretion of the commission.

IX.

STIPULATION.

The parties to any proceeding or investigation before the commission may, by stipulation in writing filed with the secretary, agree upon the facts, or any portion thereof, involved in the controversy, which stipulation shall be regarded and used as evidence on the hearing. It is desired that the facts be thus agreed upon whenever practicable.

X.

HEARINGS.

Upon issue being joined by the service of an answer or notice of hearing on the petition, the commission will assign a time and place for hearing the case, which will be at its office in Washington, unless otherwise ordered. Witnesses will be examined orally before the commission or one of its examiners, unless their testimony be taken or the facts be agreed upon as provided for in these rules. The complainant must in all cases establish the facts alleged to constitute a violation of the law, unless the defendant admits the same or fails to answer the petition. The defendant must also prove facts alleged in the answer, unless admitted by the petitioner, and fully disclose its defense at the hearing.

In case of failure to answer, the commission will take such proof of the facts as may be deemed proper and reasonable, and make such order thereon as the circumstances of the case appear to require.

Cases may be heard by one or more members of the commission, or by a special agent or examiner as ordered by the commission. When testimony is directed to be taken by a special agent or examiner, such officer shall have power to administer oaths, examine witnesses, and receive evidence, and shall make report thereof to the commission.

All cases shall be orally argued in Washington, D. C., or submitted upon briefs, unless otherwise ordered by the commission.

XI

DEPOSITIONS.

The testimony of any witness may be taken by deposition, at the instance of a party, in any case before the commission, and at any time after the same is at issue. The commission may also order testimony to be taken by deposition, in any proceeding or investigation pending before it, at any stage of such proceeding or investigation. Such depositions may be taken before any authorized special agent or examiner of the commission, judge of any court of the United States, or any commissioner of a circuit or any clerk of a district or circuit court, or any chancellor, justice or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court, or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties or otherwise interested in the proceeding or investigation. Reasonable notice must be given in writing by the party or his attorney proposing to take such deposition to the opposite party or his attorney of record, which notice shall state the name of the witness and the time and place of the taking of his deposition, and a copy of such notice shall be filed with the secretary of the commission.

When testimony is to be taken on behalf of a common carrier in any proceeding instituted by the commission on its own motion reasonable notice thereof in writing must be given by such carrier to the secretary of the commission.

Every person whose deposition is taken shall be cautioned and

sworn (or may affirm, if he so request) to testify the whole truth, and shall be carefully examined. His testimony shall be reduced to writing, which may be typewriting, by the magistrate taking the deposition, or under his direction, and shall, after it has been reduced to writing, be subscribed by the witness.

If a witness whose testimony may be desired to be taken by deposition be in a foreign country, the deposition may be taken before an officer or person designated by the commission, or agreed upon by the parties by stipulation in writing to be filed with the secretary. All depositions must be promptly filed with the secretary.

XII.

WITNESSES AND SUBPOENAS.

Subpoenas requiring the attendance of witnesses from any place in the United States to any designated place of hearing, for the purpose of taking the testimony of such witnesses orally before one or more members of the commission, or an authorized special agent or examiner of the commission, or by deposition, will, upon the application of either party, or upon the order of the commission directing the taking of such testimony, be issued by any member of the commission.

Subpoenas for the production of books, papers, or documents (unless directed to issue by the commission upon its own motion) will only be issued upon application in writing; and when it is sought to compel witnesses, not parties to the proceeding, to produce such documentary evidence, the application must be sworn to and must specify, as nearly as may be, the books, papers, or documents desired; that the same are in the possession of the witness or under his control; and also, by facts stated, show that they contain material evidence necessary to the applicant. Applications to compel a party to the proceeding to produce books, papers, or documents need only set forth in a general way the books, papers, or documents desired to be produced, and that the applicant believes they will be of service in the determination of the case.

Witnesses whose testimony is taken orally or by deposition, and the magistrate or other officer taking such depositions, are severally entitled to the same fees as are paid for like services

in the courts of the United States, such fees to be paid by the party at whose instance the testimony is taken.*

XIII.

DOCUMENTARY EVIDENCE.

Where relevant and material matter offered in evidence is embraced in a report, tariff, rate sheet, classification, book, pamphlet, written or printed statement, or document of any kind containing other matter not material or relevant and not intended to be put in evidence, such report, etc., in whole, shall not be received or allowed to be filed in a cause on hearing before this commission or at any time during the pendency thereof, but counsel or other party offering the same shall also present in convenient and proper form for filing a copy of such material and relevant matter, and that only shall be received and allowed to be filed as evidence and made part of the record in such cause; provided, however, that, if practicable, such matter may be read and taken down by the reporter and thus made part of the record.

XIV.

BRIEFS.

Unless otherwise specially ordered, printed briefs shall be filed on behalf of the parties in each case. The brief for complainant and the brief or briefs for the defendants, or interveners, shall contain an abstract of the evidence relied upon by the parties filing the same; and in such abstract reference shall be made to the pages of the record wherein the evidence appears. The abstract of evidence should follow the statement of the case and precede the argument. Briefs shall be printed in 12-point type, on antique-finish paper, 5⁷/₈ inches wide by 9 inches long, with suitable margins, double-leaded text and single-leaded citations.

At the close of the taking of the testimony in each case the commissioner or examiner before whom such testimony is taken

* Fees of witnesses are fixed by law at \$1.50 for each day's attendance at the place of hearing or of taking depositions, and 5 cents per mile for going to said place from his place of residence and 5 cents per mile for returning therefrom.

shall fix the specific dates on or before which the briefs of the respective parties must be filed with the commission and served on the adverse parties. The date so fixed, unless otherwise ordered at said time, shall allow to the respective parties the following periods of time within which to file with the commission and serve their respective briefs on the adverse parties, to wit: To the complainant, thirty days from the date of the conclusion of the testimony; to the defendants and interveners, fifteen days after the specific date fixed for the complainant, and to complainant for reply brief, ten days after the date fixed for defendants or interveners. If the briefs of the respective parties are not filed and served on the date fixed for each, the case will stand submitted without briefs on the date that defendants or interveners' briefs are due. Briefs of parties not filed as aforesaid and served on the respective parties on or before the specific dates fixed therefor will not be received or considered by the commission. All briefs shall be filed with the secretary and shall be accompanied by notice showing service upon the adverse parties, and twenty-five copies of each brief shall be filed for the use of the commission. The parties will be required to comply strictly with this rule, and except for good cause shown, no extension of time will be allowed. Applications for extension of time in which to file briefs shall be by petition, in writing, stating the facts on which the application rests, which must be filed with the commission at least five days before the time for filing such brief has expired.

Applications for oral argument may be made by any party at the close of the taking of the testimony or at the time of the filing of his brief. Such applications can be granted only by the commission.

XV.

REHEARINGS.

Applications for reopening a case after final submission or for rehearing after decision made by the commission, must be by petition, and must state specifically the grounds upon which the application is based. If such application be to reopen the case for further evidence, the nature and purpose of such evidence must be briefly state, and the same must not be merely cumulative. If the application be for a rehearing, the petition must

specify the findings of fact and conclusions of law claimed to be erroneous, with a brief statement of the grounds of error; and when any decision, order, or requirement of the commission is sought to be reversed, changed, or modified on account of facts and circumstances arising subsequent to the hearing, or of consequences resulting from compliance with such decision, order, or requirement which are claimed to justify a reconsideration of the case, the matters relied upon by the applicant must be fully set forth. At least eight copies of all such applications must be filed with the commission.

XVI.

PRINTING OF PLEADINGS, ETC.

Pleadings, depositions, and other papers of importance shall be printed or in typewriting, and when not printed only one side of the paper shall be used.

XVII.

COPIES OF PAPERS OR TESTIMONY.

Copies of any report, decision, order, or requirement of the commission will be furnished without charge upon application to the secretary by any person or carrier party to the proceedings.

One copy of the testimony will be furnished by the commission for the use of the complainant and one copy for the use of the defendant without charge; and when two or more complainants or defendants have appeared at the hearing, such complainants or defendants must designate to whom the copy for their use shall be delivered.

XVIII.

COMPLIANCE WITH ORDERS.

Upon the issuance of an order against any defendant or defendants, after hearing, investigation, and report by the commission such, defendant or defendants must promptly notify the secretary of the commission, upon the date when such order becomes effective, as to whether such defendant or defendants has complied or not with the provisions of said order; and when a change in rates is required, such notice must be given in addition to the filing of a schedule or tariff showing such change in rates.

XIX.**APPLICATIONS BY CARRIERS UNDER PROVISIO CLAUSE OF FOURTH SECTION.**

Any common carrier may apply to the commission, under the proviso clause of the fourth section, for authority to charge for the transportation of like kind of property less for a longer than for a shorter distance over the same line, in the same direction, the shorter being included within the longer distance. Such application shall be by petition, which shall specify the places and traffic involved, the rates charged on such traffic for the shorter and longer distances, the carriers other than the petitioner which may be interested in the traffic, the character of the hardship claimed to exist, and the extent of the relief sought by the petitioner. Upon the filing of such a petition, the commission will take such action as the circumstances of the case seem to require.

XX.**INFORMATION TO PARTIES.**

The secretary of the commission will, upon request, advise any party as to the form of petition, answer, or other paper necessary to be filed in any case, and furnish such information from the files of the commission as will conduce to a proper presentation of facts material to the controversy.

XXI.**ADDRESS OF THE COMMISSION.**

All complaints concerning anything done or omitted to be done by any common carrier, and all petitions or answers in any proceeding, or applications in relation thereto, and all letters and telegrams for the commission, must be addressed to Washington, D. C., unless otherwise specially directed.

**FORMS ADOPTED BY INTERSTATE COMMERCE COM-
MISSION.**

No. 1.—Complaint against a single carrier.

No. 2.—Complaint against two or more carriers.

No. 3.—Answer.

No. 4.—Notice by carrier under Rule V.

No. 5.—Subpœna.

No. 6.—Notice of taking depositions under Rule XII.

These forms may be used in cases to which they are applicable, with such alterations as the circumstances may render necessary.

No. 1.

Complaint against a single carrier.**INTERSTATE COMMERCE COMMISSION.**

A. B.
against
THE ——— RAILROAD COMPANY.

(Full title, whether of corporate complainants or defendants, must be given and not abbreviated. Full first names of individual complainants must also be given.)

The petition of the above-named complainant respectfully shows:

I. That *(here let complainant state his occupation and place of business)*.

II. That the defendant above named is a common carrier engaged in the transportation of passengers and property by railroad between points in the State of ——— and points in the State of ———, and as such common carrier is subject to the provisions of the act to regulate commerce, approved February 4, 1887, and acts amendatory thereof or supplementary thereto.

III. That *(here state concisely the matters intended to be complained of. Continue numbering each succeeding paragraph as in Nos. I, II, and III)*.

Wherefore the petitioner prays that the defendant may be required to answer the charges herein, and that after due hearing and investigation an order be made commanding the defendant to cease and desist from said violations of the act to regulate commerce, and for such other and further order as the Commission may deem necessary in the premises. *(The prayer may be varied so as to ask also for the ascertainment of lawful rates or practices and an order requiring the carrier to conform thereto. If reparation for any wrong or injury be desired, the petitioner should state the nature and extent of the reparation he deems proper)*.

Dated at ———, ——— ———, 190—.

A. B.

(Complainant's signature.)

No. 2.

Complaint against two or more carriers.**INTERSTATE COMMERCE COMMISSION.**

A. B.
against
 THE ——— RAILROAD COMPANY.
 AND
 THE ——— RAILROAD COMPANY.

(Full title, whether of corporate complainants or defendants, must be given and not abbreviated. Full first names of individual complainants must also be given.)

The petition of the above-named complainant respectfully shows:

I. That (*here let complainant state his occupation and place of business*).

II. That the defendants above named are common carriers engaged in the transportation of passengers and property by continuous carriage or shipment, wholly by railroad (*or partly by railroad and partly by water, as the case may be*), between points in the State of ——— and points in the State of ———, and as such common carriers are subject to the provisions of the act to regulate commerce, approved February 4, 1887, and acts amendatory thereof or supplementary thereto.

(*Then proceed as in Form 1.*)

No. 3.

Answer.**INTERSTATE COMMERCE COMMISSION.**

A. B.
against
 THE ——— RAILROAD COMPANY.

The above-named defendant, for answer to the complaint in this proceeding, respectfully states—

I. That (*here follow the usual admissions, denials, and averments. Continue numbering each succeeding paragraph*).

Wherefore the defendant prays that the complaint in this proceeding be dismissed.

THE ——— RAILROAD COMPANY,
 By E. F.

(*Title of officer.*)

No. 4.

Notice by carrier under Rule V.

INTERSTATE COMMERCE COMMISSION.

A. B.
against
 THE——RAILROAD COMPANY. }

Notice is hereby given under Rule V of the Rules of Practice in proceedings before the Commission that a hearing is desired in this proceeding upon the facts as stated in the complaint.

THE——RAILROAD COMPANY,
 By E. F.
(Title of officer.)

No. 5.

Subpoena.

To ——,
 ——.

You are hereby required to appear before —— in the matter of a complaint of —— against ——, as a witness on the part of ——, on the —— day of ——, 190—, at —— o'clock —. m. at ——, and bring with you then and there ——.

Dated ——

(Seal.)

——,
Commissioner.

——,
 ——,
Attorney for ——.

(NOTICE.—Witness fees for attendance under this subpoena are to be paid by the party at whose instance the witness is summoned, and every copy of this summons for the witness must contain a copy of this notice.)

No. 6.

Notice of taking depositions under Rule XII.

INTERSTATE COMMERCE COMMISSION.

THE——RAILROAD COMPANY.
 against
 A. B. }

You are hereby notified that G. H. will be examined before C. D., a —— (*title of officer or magistrate*), at ——, on the —— day of ——, 190—, at —— o'clock in the ——noon, as a witness for the above-named complainant (*or defendant, as the case may be*), according to act of Congress in such case made and provided, and the Rules of Practice of the Interstate Commerce Commission, at which time and place you are notified to be present and take part in the examination of the said witness.

Dated —— ———, 190—.

I. J.

(*Signature of complainant or defendant, or of counsel.*)

To A. B., the above-named complainant (*or The —— Railroad Company, the above-named defendant; or to K. L., counsel for the above-named complainant or defendant.*)

UNITED STATES COMMERCE COURT.

The following rules have been adopted by the United States Commerce Court with the suggestion that additional rules will probably be adopted during the next session of the Court (1911).

RULES.

Admission of attorneys.

Parties shall be entitled to be represented in court by counsel. Any person of good moral character, learned in the law, shall be admitted to practice as an attorney and counselor of this court who shall have been previously admitted to the supreme court or any other court of the United States, or to a court of last resort of any state, or territory, and who shall be in full and regular standing therein, due proof of which shall be made by certificate from the record or from one of the judges of such court or by motion of an attorney of this court. He shall subscribe to the roll at the time of his admission and take the following oath:

I do swear (or affirm) that I will demean myself, as an attorney and counselor of this court, uprightly and according to law; and that I will support the Constitution of the United States.

Arguments.

Two hours on each side shall be allowed for argument, and no more without special leave of court, obtained before the beginning of the argument. The time so allowed may be apportioned among the counsel on the same side at their discretion.

Cost and fees.

The following table of costs and fees is adopted.

Clerk:

For docketing a case.....	\$5.00
For entering any final decree or order or judgment.....	1.00

For a certified copy of an entry, record or paper on file for each folio of 100 words (no such fee, however, to be less than 50 cents)10

For admission to the bar, including certificate under seal 2.00

Marshalls:

For service of any writ, subpoena, or order, for each party upon whom service is made 1.00

In case of the service of process by the marshal of a district outside of the city of Washington, in addition to the fees just prescribed, the marshal shall receive the same mileage as is by law allowed to marshals for serving process issued by the District Court of the United States in the district where such service is performed.

No fees shall be taxed against the United States or the Interstate Commerce Commission.

Evidence.

The evidence in any case may be taken before one of the judges of the court specially designated to do so, who shall have power to rule upon the admission or rejection of the evidence offered; or it may be taken before an examiner duly appointed for the purpose, by standing or special order. Where neither of these methods is practicable, it may be taken by depositions, in accordance with the practice prevailing in the district courts of the United States in like cases. In all cases it shall be taken stenographically, in the form of question and answer, and reduced to typewriting and filed. No witnesses shall be examined in open court, except by leave of court for cause shown. The examiners shall be entitled to their expenses for each day actually engaged in the performance of their duties, and to such compensation as may be fixed by the court in each case.

Interstate Commerce Commission.

The Interstate Commerce Commission may cause its counsel to enter an appearance on its behalf in the office of the clerk of the court in any suit instituted in the court wherein is involved, in whole or in part, the validity of any order or requirement of the commission; and from and after such appearance the commission shall be a party to the suit and entitle to notice of any and all

proceedings therein, and may participate in such suit in the same manner and to the same extent as though named as a party at the time of its institution.

Motions.

All motions to the court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion.

The court may for good cause shown, shorten the time of notice of hearing of any motion.

Motions to dismiss.

Motions to dismiss a petition for want of jurisdiction, or on the ground of insufficiency, as not setting forth a good cause of action, may be made at any time before answer filed, the objections on which the motion is made being specified and filed, and may thereupon be set down for argument on two weeks' notice to the petitioner or his counsel.

Motions to dismiss the answer on the ground that no defense is set forth may also be similarly made at any time within 10 days after the answer has been filed, and shall be similarly disposed of.

If the motion to dismiss in either case is overruled, and the party making the same elects to stand by it, it may be treated as a demurrer, and judgment thereon be rendered accordingly.

Objections to the sufficiency of the petition or of the answer, as not setting forth a good cause of action or defense, may also be taken at the final hearing by way of argument without written specification.

Parties.

The party who invokes the jurisdiction of the court by petition duly filed shall be called the petitioner, and the party who answers or demurs or moves to dismiss shall be called the respondent, and the party who intervenes shall be called intervener.

Process.

Upon the filing of a petition for relief, a writ of subpoena in the name of the President of the United States shall issue, directed to the respondent or respondents, requiring him or them to answer said petition within thirty days after service thereof by filing in the clerk's office an answer which shall briefly and categorically respond to the allegations of the petition and by mail-

ing a copy of said answer to the attorney of the petitioner. Such subpoena shall be under seal of the court, signed by the clerk, and bear teste of the presiding judge. A copy of the petition shall be served with the subpoena.

The service of all subpoenas shall be by delivery of a copy thereof by the officer serving the same to the respondent personally, or, in case the respondent is a railroad or other carrier, then to the designated agent of such carrier. Where the United States is a respondent, a copy shall be delivered to the chief clerk of the Department of Justice, and where the respondent is the Interstate Commerce Commission, a copy shall be delivered to the secretary of the commission.

Printing records.

The record, including the pleadings and evidence, shall be printed prior to the argument, and a sufficient number of copies, not less than twenty-five, shall be filed with the clerk for the accommodation of the court and counsel. Each party in the first instance shall bear the expense of printing his or its part of the record, which shall be taxed as a part of the costs against the losing party, except that no such costs shall be taxable against the Government or the Interstate Commerce Commission.

The briefs of counsel shall also be printed, and a like number of copies filed with the clerk; those of the petitioners at least two weeks and those of the respondents and interveners at least one week before the time when the case is set for argument.

Each counsel appearing in a case shall be entitled to a copy of the record and of the brief of the opposing counsel, which shall be forwarded to him by the clerk at once upon being filed.

In size of books, style of type, and quality of paper the printing shall be as required by the rules of the supreme court.

All records, arguments, and briefs, printed for the use of the court, must be in such form and size that they can be conveniently be bound together, so as to make an ordinary octavo volume; and, as well as all quotations contained therein, and the covers thereof, must be printed in clear type (never smaller than small pica) and on unglazed paper.

The court or any judge thereof may, for good cause shown, dispense with the requirement of printing the record on motion for preliminary injunction.

REPORT OF THE

National Securities Commission

**APPOINTED UNDER ACT OF CONGRESS
JUNE 16, 1911.**

**REPORT OF NATIONAL SECURITIES COMMISSION
(NOV. 1911), APPOINTED BY THE PRESIDENT
UNDER SECTION 16 OF JUNE 18, 1910.**

NOVEMBER 1, 1911.

The President:

The undersigned have the honor to make to the President the following report as responsive to Section 16 of the Act of Congress approved on June 18, 1910, the material portion of which reads as follows:

“That the President is hereby authorized to appoint a commission to investigate questions pertaining to the issuance of stocks and bonds by railroad corporations, subject to the provisions of the Act to regulate commerce, and the power of Congress to regulate or affect the same * * *

1. Railroad Securities and Interstate Commerce.

The railroad companies of the United States, with only one important exception, owe their present corporate existence to state charters and are subject to state laws regarding their issue of stocks and bonds. But a large and growing proportion of their business is interstate commerce, regulated by federal authority. There is a widespread belief that the rates charged on this business are affected by the amount of stocks and bonds outstanding; that much stock has been issued without being fully paid; and that the dividends on this stock represent an unnecessary tax on interstate commerce. The railroad men as a rule deny that the amount of capital of the roads, either nominal or actual, is seriously considered by their agents in making rates. But it is frequently treated by counsel, commissions and courts as a thing of importance in determining whether rates are reasonable. If capitalization has an actual effect on interstate rates, the federal government is interested in its control.

There is still another way in which the issue of stock for less than par may affect the conduct of interstate commerce. The bondholders who loan money to the corporation may be led to believe that there is a real security behind the bonds equal to the face value of the stock, when in fact a portion of this value represents nothing more substantial than the expectation of the promoters. So far as this deception affects only the individual bondholder, we may leave it to state law to protect him. But if such deceptions become prevalent they inevitably affect the confidence of investors as a body, and our American railroad systems fail to get the full amount of capital needed for their development and for the proper conduct of their interstate business. It

is a matter of direct concern to the federal government that the facilities for handling commerce between the states should not be impaired.

These facilities embrace not only steam railroads, but the other agencies of communication and transportation enumerated in the Act to regulate commerce. While, for brevity, the language of this report is largely confined to railroads the discussion and recommendations apply generally to these other agencies.

2. Present Requirements and Future Policy.

Starting from different points, investors and shippers, and through them the general public, have come to feel that state legislation has provided inadequate security for their interests in this matter. The question is therefore asked with increasing frequency whether the United States Government should not undertake to regulate the issues of securities by the roads engaged in interstate commerce as a necessary means to its effective control. This question naturally divides itself into two parts: *First*, what immediate action by Congress will best meet the existing situation; and *second*, what general principles should guide the federal government in its future legislation on this subject.

As far as concerns the immediate action of Congress, we believe that stringent provisions regarding publicity of stock and bond issues, which will show how far the laws are obeyed, and will enable the federal government to hold the railroad officials responsible for the consequences of not obeying them, will be more salutary and more effective than any new statutory demands. So long as the railways engaged in interstate commerce are chartered by the states and subject to state laws regarding their securities added federal restriction will tend to create further confusion in a situation already too complex.

But we also believe that the time is near when the difficulties of the present system of dual control and the conflict of state laws, will become so manifest that further legislation on the subject will be imperative. Unless the constitutional power of Congress to regulate the securities of railroads engaged in interstate commerce is definitely established as being exclusive of State control, to the extent that Congress acts upon the subject one of two things seems likely to happen: Either the federal government and the governments of the several states will come to a common understanding as to the principles to be adopted in the control of security issues or the railroad systems will be given the opportunity to exchange their State charters for Federal ones. We have therefore discussed in some detail the principles which ought to govern the stock and bond issues of railroads in the United States. Whichever alternative we adopt, we ought to

have such a set of principles before us. If we are to bring about a common understanding, we need them as a basis of negotiation. If we consider federal incorporation of railroads the more desirable or practicable alternative, we need them as the ground work of a federal incorporation law, of which our roads may avail themselves when their interests and those of the public require it. Under the terms of the Act of Congress creating this Commission, it has not considered as an alternative to these possibilities, the direct ownership of the railroads by the government itself. In that case the government would issue its own securities, and none of the questions submitted to this Commission would then arise.

3. Theory of Railroad Stock Issues.

Every one knows that railroad securities are divided into two classes, stocks and bonds; very few people apprehend as plainly as they should the distinction between the two, or understand the real nature of a share of railroad stock. As to the real nature of a railroad bond, there is no doubt at all. It is essentially a note made by the company; a promise to pay a certain amount of money, say one thousand dollars, at a specific date of maturity, and to pay interest at specified rates in the mean time. The obligation is definite. The value is limited by the terms of the instrument.

But a share of railroad stock is of a different, and more complex character. It represents two things instead of one: That a certain sum has been paid in, and that the holder of the stock has a certain *share* in the ownership of the property, whatever that may prove to be. The second of these things is what ultimately gives it its value. In the case of a railroad bond the fact that it calls for one hundred or one thousand dollars is a determining factor in what it is worth. But in the case of stock, the fact that the certificate represents one hundred or one thousand dollars is far from being the determining factor. It is but one incident among many. Even in theory it purports merely to show that this was the amount originally paid by the subscriber when the road was built. It does not create an obligation to pay its face value, nor does that face represent its money value as a share. The value varies with the development of the property as a whole. If it has been wisely located and well managed it will be worth more than the amount it represents. If it has been unwisely located or badly managed it will be worth less than the amount it represents. The shareholder chose his investment, elected his management and took his risks. If he acted unwisely and fared badly he has no claim that the public should indemnify him. If he did well, the public can not either rightly or wisely fail to recognize and reward his foresight, so long as his road is managed with proper regard to the interest of the community and for the development of the traffic which it carries.

The principal of a bond is a fixed sum, its interest a fixed charge. The value of a share of stock is essentially variable, its profit essentially indeterminate.

There is a persistent tendency to ignore this distinction; to emphasize unduly the face value of the stock; to treat the shares in a railroad or other public service corporation as claims against the community for the number of dollars they represent rather than as fractional interests in a more or less hazardous enterprise, in which the investors took risks of loss and chances of profit; to allow corporations to claim immunity from public regulation when the dividend on the face value of the shares is below the prevailing rate of interest; and to subject them to vexatious attacks when this dividend is above the prevailing rate of interest, even when such profit may be a fair compensation for risks actually incurred in the past or a necessary incentive for the investment of new capital and the taking of new risks in the future.

4. State Legislation Regarding Stock Issues.

Nowhere has this tendency been more marked than in the legislation of the several states regarding stock issues of railroad corporations. It has led our law makers to lay too much stress on keeping down the nominal amount of stock and too little upon getting the actual amount of capital needed and having it properly used.

Nearly all the states require that railroad stock issues shall be paid in full at their face or par value. Eighteen have this provision in their constitutions; a majority of the others have more or less definite laws to the same effect. Even without such specific statute the requirement that the shareholder may be called upon to meet the full value of his stock subscription is operative in the absence of legislation to the contrary. Of such legislation there has been relatively little. West Virginia alone, among all the states expressly sanctions the issuance of stock at less than par, although there are several others where exceptions to the rule of full payment have been allowed, either by general statute or by special act of the legislature in particular cases.

5. Evasion of State Laws.

Where the strictness of the law regarding capital stock has interfered with the building of railroads in new communities, evasions of its letter or spirit by railroad companies have been frequent. The very rigidity of the statute has caused the public to be negligent in its enforcement. In some cases the laws have been so drawn as actually to invite evasion, by specifically leaving it to the judgment of the directors to decide what constituted an adequate consideration for the shares. The companies have thus been enabled to represent that their stock was fully paid,

when this was not in fact the case. Some times stock has been issued by the promoters of a company to themselves as a reward for their services in organization and management. Some times it has been issued in exchange for rights of way and other forms of assistance to the construction of a new road, without much regard to the cash value of the consideration received. Some times it has been issued to stockholders to represent the increased value of their property, actual or prospective, on the theory that such value represents undivided profits which the stockholders have not received or do not receive in cash, and are therefore entitled to obtain in scrip. Some times it has been issued in reorganizations, consolidations, or in exchange for the stock of other companies, on terms not really warranted by the facts in the case. Some times stock so issued as full paid has been given as a bonus to induce people to subscribe for bonds.

Besides these direct methods of evasion, there have been more indirect means of reaching the same result. Lines have been built through the agency of construction companies and paid for by the issue of securities whose face value considerably exceeded the actual cost of the roads themselves.

All these practices, with the possible exception of the one last named, have been much more frequent in the past—particularly during the great periods of railroad expansion from 1853–57, 1869–72, 1879–82—than they have been in recent years. This change is not wholly due to increased stringency in the laws. It is partly due to wise administrative measures for their enforcement, and partly to the increased demands of investors in bonds for the real data as to the security underlying them, which has compelled managers of corporations to give greater publicity as to the real facts. The Chicago & Alton reorganization is the only instance in the last decade which has been brought to our cognizance where the public has been offered a large issue of railroad stock (as distinct from the stock of a holding company), based merely upon an estimated increase of value. Recent attempts to capitalize expected profits in connection with other public service corporations or with industrials, do not come within the scope of this inquiry.

6. Danger of Evasion of Federal Law.

A federal law requiring full payment of all stock issues, without special machinery to enforce it, could be evaded as state laws have been evaded in the past. In fact, the liability to evasion might be greater because in some parts of the country a statutory requirement of this kind, imposed by the federal government, would be regarded as an interference with the rights of the several states; and local companies attempting to build new lines with stock not fully paid might have the support of local public sentiment in so doing. It is possible that in some

instances the federal government could not even count upon the vigorous assistance of the state authorities themselves in trying to enforce such an act at all rigidly. Such a federal requirement superadded to the state requirement might simply mean that every company would be led to make two deceptive returns instead of one. A federal requirement conflicting with a state requirement might leave us in an even worse case; for the impossibility of obeying both authorities would be made an excuse for obeying neither. This would clearly be true until the paramount authority of the federal government was established.

7. Enforced Uniformity not yet Attainable.

To make legislation of this kind effective, it would be necessary to provide federal agencies for carrying out its requirements in detail. We should be compelled either to burden the Interstate Commerce Commission with a large amount of additional work, or to create a new commission to supervise railroad incorporation and construction in different parts of the country.

If we were ready to substitute exclusive federal control for the jurisdiction of the several states over their railroad corporations, much could be said in behalf of the establishment of a national authority to supervise both the issuance of stocks and bonds and the actual expenditure of their proceeds. But, apart from the constitutional difficulties which might stand in the way of such a procedure, your Commission is of opinion that, as a mere matter of expediency, the time is not ripe for any such immediate or forcible transfer of jurisdiction. The local needs of different parts of the country are still divergent. Many railroad problems, both of operation and of control, are still in the experimental stage. Enforced uniformity under federal law would, in the opinion of many, discriminate against the development of new territory and the formation of independent companies, for a well established system has less difficulty in securing the necessary capital by pledging its credit than an independent projector wishing to develop a new district. These dangers and difficulties may have been somewhat exaggerated. While they undoubtedly exist in certain cases, they are of a sporadic, rather than a general, character. But they are urged with much force, both by state railroad commissioners and by independent builders; and they would constitute obstacles to the effective enforcement of a federal statute. Before such a statute is enacted, it should be clearer than it now is that public opinion would support it. Under such circumstances the immediate assertion of exclusive federal jurisdiction under one general railroad law appears unwise.

Until such exclusive jurisdiction can be established, the creation of a separate administrative body subjecting the railroads of the country to a new system of concurrent supervision, in ad-

dition to the many old ones which now exist, does not seem just, expedient or economical.

8. Enforced Publicity Immediately Needed.

In place of any added federal requirements concerning payment for capital stock, your Commission recommends the adoption of provisions regarding publicity which will show the actual facts regarding stock and bond issues in the several states, and the consideration received therefor. Any railroad doing interstate business which issues bonds or stocks should be required by statute to furnish the Interstate Commerce Commission at the time of the issue with a full statement of the details of the issue, the amount of the proceeds, and the purposes for which the proceeds are to be used, followed in due time by an accounting for such proceeds, as more fully hereinafter set forth.

An Act of this kind does not limit the freedom of the several states to make any kind of laws which they please regarding their own corporations. If they want them stringent they may make them stringent. If they think they can encourage the investment of capital by permitting the issue of stock for less than par, they can allow such issues. If the result of enforcing existing laws interferes with local needs, they may change the laws, but the companies must indicate precisely what they are doing. They must not attract the bondholders' money by representing that there has been a payment of one hundred cents when there has only been a payment of fifty cents. They may, if they please, direct the treasurer to set down their partly paid stock in the balance sheet as a liability in full; but they must make it plain to the investor today and to the public tomorrow how much of that liability was represented by cash assets contributed and how much consisted of what is called in English balance sheets nominal additions to capital. Such liability is of the corporation to its stockholders and not of the public to either.

9. Mode of Procedure.

Two courses lie open before us in our effort to secure publicity regarding railroad securities: Either to require the express sanction of some administrative body (presumably the Interstate Commerce Commission) before such securities are issued, or to rely on general statutory provisions under which the directors may issue such securities and be held responsible for their proper use. In the case of either of these alternatives the accounting required must be full and adequate in every respect, and the Interstate Commerce Commission or other administrative authority must be empowered to do whatever may be necessary in its judgment to secure compliance with the statute and to prevent

injury to the public. Either alternative would involve the valuation of property and services whenever such valuation may become necessary in establishing the integrity of the financial transactions involved.

The first alternative insures reasonably full publicity before the fact. Official inquiry following the formal application would tend to discourage attempts at evasion; and would probably in many instances prevent the filing of applications for issues which are questionable either because of their financial unsoundness or because they duplicate existing lines instead of adding to public convenience.

Your Commission nevertheless prefers the second alternative and doubts the expediency under present conditions of a general law forbidding railroads to sell securities without specific authorization in advance, it being understood that the face value of these securities is not to be construed as an obligation on the public. Authorization in advance would tend to create an impression on the part of the investing public of a guaranty or official recognition of values, which no administrative authority can safely give. The absence of such recommendation by this Commission is intended to make it clear that no such guaranty or official recognition is to be given. A growing railroad has constant need of money, and its officers and directors are the best judges of the amount of its annual requirements. It is manifestly to the interest of the company and of the public that a road should get its money as cheaply as it can. The policy of allowing a floating debt to accumulate with a view to its extinction by the sale of permanent securities upon the completion of its improvements is not a good one, and should be avoided whenever possible. An administrative body where approval was required in advance for the sale of securities would have great difficulty in always acting promptly enough to enable the roads to avail themselves of favorable money markets and avoid the creation of floating debt, and might do its work so carelessly as to result in shielding the directors from responsibility, instead of acting as a safeguard to the public.

We are disposed to leave for the present to state commissions the responsibility of passing upon the questions of public convenience and necessity involved in the building of lines to be constructed within the limits of their several states, and to rely on full publicity as to the use of the proceeds of the sale of securities and of other assets as a safeguard against financial abuses.

10. Facts to be Disclosed.

With this end in view, every company should be required to furnish to the Interstate Commerce Commission at specified dates, a full statement including the names of the parties con-

cerned, of all financial transactions that have taken place during the periods covered by the report, whether in cash, in securities, or in other valuable considerations, and whether embraced in income account or outside of it. This statement should also include the disposition of surplus. Every company should be further required to compile for the information of its shareholders facts in regard to the financial transactions of the company for its fiscal year, of such a character and in such form as the Interstate Commerce Commission may direct.

The Interstate Commerce Commission should have the power to investigate all such financial transactions, and to inquire into the bona fides thereof; the right to call for the production of books and papers of railroad companies, construction companies or other companies with which the railroad company shall have had financial transactions for the purpose of enabling it to verify any statements furnished to it; and the power to examine into the actual cost as well as the value of property acquired or of services rendered. In all transactions investigated, from the purchase of supplies to the acquirement of new lines by consolidation, every interest of the directors should be disclosed, and adequate penalties provided for any failure to make such disclosure.

This enumeration is illustrative and not inclusive. Some of these items the Interstate Commerce Commission now requires in the reports of the companies; other items are not now required and probably cannot be under the present Act to regulate commerce. All of them call for facts or groups of facts which the Interstate Commerce Commission should be empowered to ascertain in the administration of an Act, such as the one we have prepared and submit herewith as a suggestion.

11. Physical Valuation.

"Physical valuation" of railroads in its bearing on capitalization has been to some extent advocated and to a greater extent opposed from the idea that, if undertaken by the United States government it will be a justification for reducing the amount of the outstanding securities of the railroads to the figure thus ascertained, or for preventing them from issuing new securities when the amount of their outstanding stocks and bonds exceeds the physical value of their properties as so determined. Should a valuation of the physical railroads be made, it ought not, if properly applied, involve either of those dangers.

An attempt to scale down old securities is clearly out of the question. Apart from the obvious constitutional difficulties of such a course, considerations of public expediency of themselves forbid it. The direct loss from the unsettlement of legal and equitable relations would be very great. The indirect loss from the withdrawal of confidence in American railroad investments would be immeasurable. Such a readjustment would become

archaic almost from the outset, because an adjustment of securities based upon the values of today might be totally erroneous tomorrow. It would be equally inadvisable, in cases where outstanding securities were in excess of the physical valuation, to prohibit the issue of new securities until physical valuation had become equal to the amount of securities outstanding because this principle, if generally applied, would prevent roads so situated from securing the capital needed for the service of the community.

Whenever a railroad company acquires new property in return for the issue of its securities, or in expending the proceeds of such securities, every means should be placed at the disposal of the Interstate Commerce Commission to ascertain the value of such property as accurately as possible. A fundamental, though not necessarily a controlling, element in value, is cost of reproduction. This is true of property in general; it has been specifically affirmed of railroad property by the Supreme Court of the United States. Eminent railroad men who have appeared before this Commission have stated that in their opinion cost of reproduction or physical valuation was the most important single element in determining the true value of the railroad as a whole. Indeed, we believe it to be in the interest of railroads, no less than of those who use them, that the Interstate Commerce Commission should be given broad powers and adequate means for valuation of the physical property of railroads as one element in determining fair value, whenever in the judgment of the Commission this is of sufficient importance to warrant such action. This will give the public information which it is entitled to demand, and which can, in our judgment, be better and more economically obtained in this way than in any other. The attempt to oppose a system of physical valuation of this kind tends to give countenance to exaggerated estimates of the amount of water in railroad stocks.

12. Results to be Expected.

We believe that the powers granted to the Interstate Commerce Commission by the preceding recommendations may be found large enough to protect the public, without the necessity of passing a law that should require specific approval in advance of the amount and purpose of stock and bond issues.

We do not say that the enforcement of a law of this kind will be easy. The public in all parts of the country has become accustomed to the evasion of laws concerning capital stock. It is far easier to pass a radical measure which is going to be evaded than to secure obedience to a conservative one. But we are confident that full public knowledge of the facts will diminish the evils and misunderstandings described in the opening paragraphs of this report as being the chief sources of the demand for immediate federal action, and will at the same time furnish the proper foundation on which to base more thorough-going reforms.

One of these evils was that bondholders were at times deluded into the belief that there was a security behind their bonds which did not exist, and that the railroad company was mortgaging a piece of property when it was only capitalizing an expectation. They thus entrusted the control of their money to men who had comparatively little at stake. If a profit was made the promoters could appropriate it; if money was lost, the loss fell on the bondholders. Roads built largely with borrowed capital at the beginning have been prevented from subsequently obtaining the credit which they might otherwise command. They have therefore been less able to give to the shippers or to the travelers the facilities which are requisite no less for the convenience and safety of the public than for the profitable utilization of the railroad itself. To the extent that we lessen debt, we shall increase the power of the roads to raise money when the public needs added facilities and shall at the same time reduce the chance of default and lessen the severity of commercial crises.

But to most people the danger of these financial consequences seems a less serious thing than the danger that the railroads will tax the users of the road for the sake of making profits on capital not actually furnished. The necessity for paying interest on bonds and the desirability of providing for dividends on stock are some times urged as a justification for the increased rates; and they are frequently put forward as a reason why existing rates may not fairly be interfered with by law. To meet this danger, so far as it is a real one, and to avoid this misapprehension so far as it is a misapprehension, it is essential that the stock should be what it purports to be. If it purports to represent one hundred dollars paid in on every share, one hundred dollars should actually be paid in. If it purports only to be a participation certificate giving a proportionate interest in any profits that may be earned, it must be understood that this is its essential character, and that if it claims any further rights than this, it must prove them by specific evidence. This is in the interest of all parties—of the honest investor and of the progressive manager, of the shipper, the traveler and the general public.

If full publicity be given to the real facts, we shall also lessen the fraudulent creation of debt. It is the degree of publicity as to facts, rather than the stringency of the law, which gives the people any real protection. A stringent law inadequately enforced and secretly evaded, is the worst thing that can possibly be offered the public, because it gives color to claims which have no foundation in fact.

13. Conflicts of Jurisdiction.

While we do not think that the time is ripe for a sudden and quasi-compulsory transfer of the direct control of the stock and bond issues of interstate railroads from the states to the federal

government, we cannot help recognizing that there are conflicts of jurisdiction in the construction, operation and financing of interstate railroads which may more and more embarrass interstate commerce and necessitate a larger degree of federal control, or even result in federal incorporation.

A road organized by an individual state is subject to state jurisdiction regarding certain rates and facilities and purposes for which securities may be issued, and is responsible to the state courts for the performance of its functions. The instant that its cars or that its shipments pass across the state line or are routed to points in other states, it becomes responsible to the Interstate Commerce Commission and to the federal courts. Constitutionally Congress has paramount authority over interstate commerce and by its action can abrogate any previous action of the states which may prove inconsistent therewith. Practically it is easy to see how a conflict may arise between local and national requirements regarding facilities or methods. The state may prescribe one way of doing business; the national government may prescribe another, and forbid the one ordered by the state. It is only by the care of our railroad commissioners, state and national that serious difficulties of this kind have been avoided in the past.

Even more perplexing are the questions which may arise in connection with the control of interstate railroad rates. The local legislatures and commissions have ideas of their own regarding rates which may differ in some respects from the ideas of Congress or of the Interstate Commerce Commission. But the relation between through and local rates is frequently so close that the two sets of things cannot be arranged on independent principles. The reasonableness of the through rate may depend upon its relation to the local rate, and vice versa. It becomes increasingly difficult each year to leave a corporation free to fix its local rates subject to the jurisdiction of state commissions and state courts only.

Thus the exercise by a state of its authority over railroads organized or operating in its territory, prescribing terms on which, and the limitations within which, it may issue securities, may directly interfere with and embarrass interstate commerce, when the issue of such securities is essential for raising funds to be applied in furnishing the necessary facilities for its interstate traffic. One or more instances of this have been brought to our attention. That they have not been more numerous is doubtless owing to the discretion and conservatism which have usually characterized the action of state commissions. Such state regulation of the security issues of interstate railroads may be wise or unwise from a local point of view: but the state determination cannot control the federal right. This danger of possible interference with interstate commerce necessarily tends to increase with the number and activity of state commissions; and it was for the protection of

such commerce against any interference that the power of regulation was vested in the federal government.

14. Development by Intercorporate Holding.

Some states have laws compelling railroads within their borders to be organized under the laws of the states in which they are located and forbidding foreign corporations, so-called, from constructing, owning and operating lines thus located. The effect of these and other similar statutes has been largely avoided by a system of intercorporate holdings, under which a corporation organized in one state which owns the stock or the major part of the stock of a road in another state can secure the capital necessary for construction or betterment without subjecting itself to the restrictive laws of the state where the money is actually spent. One or two instances will show how this system works.

The state of Texas has a law which rigidly limits the extent to which roads in that state may be capitalized. It seems to have been the expectation of those who passed the Texas law that it would be a protection to all those interested in the proper operation and regulation of railroads. But it has had the practical effect of making it difficult to get directly by the sale of securities of railroads located in Texas, the necessary capital for their improvement; because if a road was already capitalized to an amount in excess of the official valuation of the State Commission, no further securities could ordinarily be placed upon the property for necessary improvements, until this deficiency was made good. Under these circumstances companies organized in other states which own lines in Texas needing added investments of capital in order to handle their traffic in that state economically, frequently resort to a simple expedient. Instead of issuing securities of the Texas company they pledge the credit of the parent company and put into a collateral trust any hitherto unpledged securities of these Texas roads that they may have in their treasury and if they have none, then other securities or property, thus issuing under the authority of another state securities whose proceeds are to be spent in Texas.

When the Chicago, Milwaukee and St. Paul Railroad wished to build its Puget Sound extension it had to pass through several states whose laws forbade corporations chartered under laws of other states to build roads within their borders except as a connection or prolongation of a road actually built to the state line. In order to conform to these restrictions, the St. Paul Road would have had to build its line slowly, step by step, instead of doing work in several states at once and putting the road through as promptly as possible. To avoid this difficulty it had to organize a separate company to build the road in each state which had such a law. This in itself was not a serious evil; it simply involved additional expense, to have separate corporations do things

piecemeal which might have been done as a unit without such intermediaries. But it tended to render state control less effective, instead of more so. The system thus forced upon the St. Paul Road would give every opportunity for deception to a road which might want to deceive.

Where a company builds its own roads, it is possible to find out what they cost and have the matter properly entered in the balance sheet; but where a corporation is artificially encouraged to divide itself into several parts, the parts that do the constructing can sell their finished roads to another part, at an abnormal profit. This transaction may furnish the parent company an excuse for an over-issue of securities. If the securities thus over-issued are paid for in full, it will put a certain amount of cash into the treasury of the newly organized company for which it becomes very difficult to hold the directors of the parent company to strict account. If they are not fully paid for, it simply means that the alleged profits of the parent company may be made the excuse for furnishing its stockholders, in the shape of a dividend payable in its own stock, a number of pieces of paper whose face value is greater than the amount actually contributed.

15. Control by Intercorporate Holding.

Of the total amount of railroad capital outstanding on June 30, 1910, \$3,952,000,000, or more than twenty per cent of the whole, was held by railroad companies themselves. About one-third of this was bonds, and two-thirds stock. There is also a large additional amount of railroad securities owned by various "holding companies," which are not, technically speaking, railroad corporations, and do not make return of their capital to the Interstate Commerce Commission, but which control the policy and direct the operation of the roads whose securities they have purchased. Any artificial stimulus to these intercorporate holdings is a public evil. Where a railroad controls the operations of another railroad by owning a majority of its stock, or where a holding company controls the operations of several roads in the same manner, we have all the disadvantages of consolidation, without getting all of its advantages. We get the centralization of financial power; we do not get all the economy of operation which should go with it.

Apart from this general danger, we open the way to several specific evils.

Where a railroad controls the operations of another road by the ownership of a majority of its stock, there is constant danger that the minority holders will not be fairly treated. The road thus purchased has become part of a large system, and is operated by the representatives of the whole system. It is almost certain that the advantage of the whole will be preferred to the separate interests of the part in matters of operation, traffic and finance.

Again, the existence of two or more companies under the same management, having separate organizations but united control, invites the concealment of financial transactions by the shifting of charges from one company to another. We have already shown how this may happen in the construction of a new road. It is equally possible in the operation of an old one.

16. Financial Dangers.

A further effect of intercorporate holdings is to change contingent charges into fixed ones. A railroad company buying the stock of another company almost always issues collateral trust or other bonds to pay for it; in other words, it puts the stocks into its own treasury and sells the bonds to the public. As long as the road is prosperous, this change does little harm. In fact, it may appear to do good. When a company has been able to buy a five per cent stock by the issue of its own four and a half per cent bonds, there is an apparent profit of one-half percent annually on the transaction to the company and an apparent reduction in total charges which it must meet. But with the diminution in traffic, the bad effect of the change is at once obvious. The interest on the bonds remains a fixed charge against the company. The effect of a loss of dividends would have been felt chiefly by the individual stockholders. A default, or even a threatened default, of interest has an effect on the credit and confidence of the country as a whole, and may precipitate a financial crisis.

The extent to which the credit of our railroads is being pledged is evidenced by the change in the proportion of railroad stocks and bonds held by the public. In 1899 these were nearly equal; \$4,307,000,000 stocks and \$4,366,000,000 bonds. Eleven years later the figures given by the statistician of the Interstate Commerce Commission were \$5,578,000,000 stocks and \$8,865,000,000 bonds—a serious disproportion. The growth of intercorporate holdings is responsible for a considerable part of this change. This disproportionate growth of fixed interest-bearing obligations as compared with stock is primarily the result of the issuance of bonds in payment of roads acquired and would still have taken place even if title had been taken in fee instead of through stock ownership; but the latter method, by reason of its facility for the issue of collateral trust bonds, has unquestionably been an important factor in creating this disproportion.

So long as different parts of what is naturally a connected system of railroads are chartered by separate states, there are likely to be artificial obstacles to consolidation; and while these obstacles exist, we shall find it difficult either to check the tendency toward increased intercorporate holdings, or to deal with the evils incident thereto. Each instance of intercorporate holdings thus furnishes an added argument for federal charters.

17. Alternative Methods.

In the present state of the law, there are two distinct methods by which we might avoid conflicts between the state and federal government in the control of railroad stock and bond issues, and deal with the problems of construction and finance incident thereto.

One method relies on a full interchange of views between the Interstate Commerce Commission and the commissions of the several states, as a means of securing harmony. If it is possible for the members of all these different bodies to arrive at a common understanding on a question of public policy, they usually have little trouble in getting the necessary authority from Congress and the state legislatures to put a consistent policy into effect. This way of doing things was illustrated in the legislation regarding safety appliances a few years ago; it is just being illustrated in connection with control of railroad accounts today. In each of these matters a great deal of trouble was made by conflicting requirements; in each, a full discussion of the questions involved was followed by a substantial agreement on the main points, and the good sense of the several commissions prevented serious difficulties from being raised about minor ones.

Whether we could secure a similar agreement on matters of finance, where the conflict of interest between different localities is more serious and the differences of opinion more fundamental, is open to doubt.

If the public interest of the United States as a whole should be jeopardized by these differences, we can perhaps have recourse to a Federal Incorporation Act, which shall permit railroads to exchange their state charters for federal ones. We believe that such an Act could be so drawn as to offer advantages in the conduct of interstate traffic without unduly conflicting with local interests. The most important of these advantages would be: (1) The right to construct lines needed for interstate commerce, under proper local supervision, and with proper regard for local needs, but without the agency of local corporate organizations; (2) The right to have rates supervised by a single authority which could pay proper regard to the mutual relations of local traffic and interstate traffic, instead of two separate authorities dealing with the two things independently; (3) An equitable system of taxation which would distribute to the several states their proportionate parts of taxes levied on both the tangible and intangible property of the railroad by some harmonious plan.

It is too early to make definite choice between these two alternatives. But it is not too early to indicate the principles which should guide our legislation concerning stocks and bonds in either event. For our progress toward putting these principles into effect will necessarily be slow, by either method. If we try to bring the views of different legislatures into harmony, the dis-

cussion must be deliberate in order to have any chance of success. If we rely on permission to exchange state charters for federal ones, we must give both the railroads and the states time to learn the wisdom of availing themselves of this opportunity.

If in the discussion that follows we have seemed to have more definitely in mind the adoption of a federal charter than federal control of state corporations, it is because this method enables us to make our suggestions in clearer and more concrete shape; the underlying principles and aims would be substantially the same in the two cases.

18. Treatment of Existing Issues.

Whatever alternative we adopt, any disturbance but a voluntary one of the existing amounts or status of bonds or stocks validly issued is clearly inadmissible; and in general there should be as little disturbance as possible of the relations today existing between different classes of security holders. These relations often seem unnecessarily complicated, both in their provisions regarding distribution of income and in their delegation of voting powers.

The absence of any attempt to base security issues upon revaluation will emphasize the true character of our American railroad stocks, as being essentially participation certificates giving a right to a proportionate share of whatever profits may be earned, rather than as evidences that a certain specific amount of money has actually been invested in the property.

19. Price of New Issues of Stock.

A most important and difficult question is that of the price at which new stock may be issued. We believe that no restrictions except those of publicity should be placed upon the power of the directors to issue new stock pro rata to their stockholders at or above par, even though the price received be less than the existing market value of the old stock. The experience of Massachusetts has shown that the attempt to prohibit the issue of stock below its market value has hampered the investment of capital and has distinctly interfered with the development of facilities. If this has been the experience of Massachusetts, where capital was abundant, we can hardly expect better results in states where capital is more scarce.

A further objection to any attempt to compel the sale of new stock at a price above par is that it implies a certain warrant that this value, thus publicly fixed, will be maintained in the future, on the old stock as well as the new. In thus attempting to limit profits, it may actually tend to guarantee them.

The question whether the directors should be allowed to issue stock below par is a harder one to answer. On the face of the matter it seems as though the requirement that no stock should

be sold at less than par was a fundamental principle of sound finance. So it is, if it results in the sale of stock at par; not so, if it results in the sale of bonds at a discount. If a road whose stock, for any reason whatsoever, sells below par is prohibited from issuing stock at less than par, it means that it must raise all its money by bonds. It is compelled to go more and more deeply into debt. The worse the financial position of the road, the stronger is the compulsion and the heavier are the interest charges on the bond. To compel the weaker roads to pursue their present policy of issuing fixed interest-bearing obligations by reason of their inability to sell stock at par may before long, by reason of a large crop of receiverships, result in intensifying the acuteness of the next panic and in prolonging the subsequent business depression.

If the stock bears upon its face the statement that each share represents a contribution of one hundred dollars or any other specified sum which constitutes its par value, we see no easy way of avoiding this difficulty. If a document says one hundred dollars had been paid, one hundred dollars ought to be paid. The most that can properly be done is to allow companies which cannot sell such stock at par to arrange for the "amortization," or gradual cancellation, of any necessary discount by appropriating, out of future income or surplus which may accrue subsequent to the issue of such stock an annual sum having precedence over dividend payment, to be so applied on capital account as to make the deficiency good in a period of no very great length. If proper provision is made for thus cancelling or amortizing this deficiency, such stock may properly be made, by general law, non-assessable. The reluctance of directors to impair their ability to pay dividends for a term of years will prevent the abuse of this power. We believe the issue of stock at a discount, under safeguards like these, to be far preferable, in the interest of the public, to the sale of bonds at a high rate of interest, or what amounts to the same thing, at a large discount.

20. Shares Without Par Value.

We do not believe that the retention of the hundred dollar mark, or any other dollar mark, upon the face of the share of stock, is of essential importance. We are ready to recommend that the law should encourage the creation of companies whose shares have no par value, and permit existing companies to change their stock into shares without par value whenever their convenience requires it. After such conversion any new shares could be sold at such price as was deemed desirable by the board of directors, with the requirement of publicity as to the proceeds of the sale of such shares and as to the disposition thereof; giving to the old shareholders, except in some cases of reorganization or consolidation, prior rights to subscribe pro rata, if they so desired, in proportion to the amount of their holdings.

As between the two alternatives of permitting the issue of stock below par, or authorizing the creation of shares without par value, the latter seems to this Commission the preferable alternative. It is true that it will be less easy to introduce than the other, because it is less in accord with existing business habits and usages, but it has the cardinal merit of accuracy. It makes no claims that the share thus issued is anything more than a participation certificate.

The objections to the creation of shares without par value are two in number. First, that their issue will permit inflation, by making it easy to create an excessive number of shares, and second, that it will produce a division of roads into two classes, those whose shares have a par value and those whose shares have not. The second of these objections does not appear to be a very serious one. There are listed on the stock exchanges today, side by side with one another, shares of the par value of one hundred dollars, shares of the par value of fifty dollars, shares with very much smaller par value, and a few, like the Great Northern Ore Certificates, with no par value at all. The share sells in each case simply for what the public supposes it to be worth as a share. The danger of inflation deserves more serious consideration. We believe, however, that it is more apparent than real, because shareholders will be jealous of permitting other shareholders to acquire shares in the association except at full market value, and will not permit the issue of such shares to themselves at prices so low as seriously to impair the market or other value of their holdings. Shares either with or without par value, and whether sold at par or above par or below it, should, except in cases of consolidation and reorganization, be offered in the first instance to existing shareholders pro rata.

The issue of stock without par value offers special facilities for consolidation and reorganization.

Where two roads have consolidated whose shares have different market values, it has been the custom to equalize the difference by the issue of extra shares of the consolidated company to the owners of the higher priced stock. This practice has always tended to produce increase of capital issues, and may readily cause the new stock to be issued for a consideration less than its par value. The only alternative was to scale down some of the old stocks; and this often involved serious difficulties, both of business policy and of law. By the simple expedient of omitting the dollar mark from the new shares, the number can be adjusted to the demands of financial convenience, without danger of misrepresentation or suspicion of unfairness to anyone.

In the case of reorganizations, the advantage of shares without par value is even more conspicuous. It is here that the necessity and justice of getting money from stockholders is greatest; it is here that the impossibility of getting them to pay par for new

shares is most conspicuous. We believe that in such cases the public interest would be subserved, and the speedy rehabilitation of the roads promoted, by requiring the conversion of the common stock and encouraging the conversion of the preferred stock into shares without par value; the certificates simply indicating the proportionate or preferential claims of the holders upon assets and upon such profits as might from time to time be earned.

All of these considerations seem to apply with equal force to the securities of railroads under state incorporations, and we believe the laws of the several states could with advantage be modified so as to provide for the issuance of stock without par value.

21. New Issues of Bonds.

It seems to be generally agreed that no limitation should be placed on the price at which bonds can be sold. But any discount should be cancelled or amortized during the life of the bonds by the appropriation each year, out of annual income or surplus accumulated after the issue of the bonds, of not less than the proportionate amount of the discount. In the case of convertible bonds, the same provision should hold good, with the additional restriction that after conversion the laws governing the amortization of discount on stock sold below par should apply also to the unamortized discount on convertible bonds. While the convertible bonds themselves may be sold below par, the conversion price of the stock should equal its face value; except of course in case of shares without par value, where no limit as to conversion price is necessary, nor any amortization after conversion. The premium on bonds redeemed before maturity or the unamortized discount on bonds thus redeemed should be charged to profit and loss, and provision made for the gradual cancellation of this charge out of income.

Issues of convertible bonds should be offered to stockholders pro rata, in the same manner as stock itself, to the extent to which they may choose to avail themselves of the privilege of subscription.

22. Dividends and Reserve Funds.

No attempt should be made by statute to limit railroad profits to a fixed percentage, or to treat a high cash dividend as necessarily indicating extortion. Railroad charges must be reasonable, but to try to control rates by arbitrarily limiting profits, is to put the manager who makes his profit by efficiency and economy on the same level as the one who tries to accomplish the same result through extortionate charges.

Scrip, bond and stock dividends should be prohibited. They are commonly justified on the theory that the company has in times past put earnings into the property which it might have divided among the stockholders and that the scrip dividend merely reimburses the stockholders for what they have put into the road.

But these sums were put in, either to make depreciation and obsolescence good, or as actual additions to the property. In the former case the capital account ought not to be increased. In the latter case any such increase gives color to the claim that the shippers have been taxed to pay for the improvement of the property, and that the stockholders have appropriated the result.

Many of the stock dividends in past years have represented an increase in the value of the property, not paid for either by investors or by shippers, but due simply to the foresight of the management in locating and organizing its business wisely. Under these circumstances a stock dividend to represent this increased value may possibly have been justified. But it is far better to let the increased value be shown by a regular rate of dividend on the existing shares of stock, instead of by an addition to their nominal amount.

If we prohibit scrip dividends, we can permit the creation of proper reserve funds, without having them regarded with suspicion as being a pretext for future issues of unpaid stock. Sound finance demands that the companies should set aside such funds, out of income, to "defray the cost of progress." They can thus provide against obsolescence, or make improvements which add nothing to the earning capacity of the property and ought not therefore to be made the basis of increased capital liability.

Failure to encourage the creation of reserve funds out of surplus earnings would cause a constant increase of fixed charges, already heavy enough. Whatever gain there might be in a present lowering of rates would be merely temporary. Investors and shippers would alike be misled; the former into a fancied security as to the permanence of dividends, the latter into the belief that such reduction in rates was permanent. Ultimately such a course would lead either to higher rates or to steadily diminishing dividends and consequent impaired credit. Railroad credit is an important asset to the entire country and it should not be wasted. In encouraging, therefore, the creation of reserve funds, we are only suggesting that the present generation shall not be unmindful of its obligations to future users of transportation.

Cash dividends are not likely to be as large as scrip dividends, because the former involve the distribution of a corresponding amount of cash, while the latter does not. Under these circumstances the prohibition of scrip dividends should of itself encourage the creation of proper reserve funds. In this as in other respects, all these three proposals—freedom from arbitrary restriction of profits, prohibition of scrip dividend, and creation of proper reserve funds—hang closely together. Any one by itself may be of doubtful value. Taken together, they should produce a result advantageous to all.

23. Treatment of Intercorporate Holdings.

Whatever may be the evils due to such holdings, an unqualified prohibition of the ownership of stock of one road by another involves too much disturbance of existing relations to warrant us in advocating it. Much will be accomplished if we do away with the unnecessary extension of these holdings, and provide for equitable dealings between the representatives of the purchasing company on the one hand, and the holders of minority interests on the other.

If a railroad company is allowed to build the necessary lines into other states for the handling of interstate business, instead of being compelled to create some separate company to do this, one fruitful reason for intercorporate holdings will be done away with. If we have full requirements of publicity regarding the purchase of stock of other companies and have the disclosure of directors' interests therein, another source of danger is avoided. If, finally, we can remove artificial obstacles to consolidation by permitting the issue of shares without par value, we shall be able to avoid the expense of double corporate organization where a single company would better serve public economy and convenience. In this and other respects, many of our difficulties are due to the attempt to rely upon competition in a business which, in private hands, should be treated in essentials as a regulated monopoly.

Any company, or group of companies, which has purchased a majority of the stock of any existing road may properly be required to buy the minority stock at the same price as that paid for the majority stock where the price has been uniform. If the price has not been uniform, the purchase should be either at the average price paid for such holdings or at a price to be fixed by appraisal, at the option of the minority stockholders.

If a company has acquired control of the common stock of another, but not of its preferred, it should be required either to buy the preferred stock, or to make the preference cumulative. For the continued existence of a non-cumulative preference under such conditions will offer constant temptations to unfair dealing, if not to actual fraud.

In order to avoid vexatious opposition to consolidation by a minority it should be possible, after such an offer had been fairly made, to convey the property by three-fourths vote of the shareholders and dissolve the corporation. The purchase of less than a majority of the stock of one line by another (except as one of a group of railroads jointly holding the stock of some connecting company) should be discountenanced and as far as possible prohibited.

What we have here said applies only to intercorporate holdings arising out of railroad affiliations permissible under existing statutes and not in conflict with declared principles of public policy.

24. Reasonable and Unreasonable Expectations.

An agreement on these lines will enable us to avoid many existing conflicts of jurisdiction, and will incidentally remote honest and responsible management of our railroads in every department. So far as it does this, it will be a good thing both for investors and for shippers. But the extent to which a law regarding security issues, however well drawn, can protect either the investor or the shipper is quite limited.

Most of those who advocate legislation on this subject hope for wider results than can possibly be reached by any such means. One man expects that a good law on stock and bond issues will be of great service in enabling courts and commissions to protect the shippers against overcharge. A second believes that both investors and shippers can be benefited by an abolition of the profits of the promoter. A third thinks that our securities can be standardized, so that the investors will be sure of getting the returns which are promised them. A fourth demands that public confidence be so restored that the community may get the railroad capital it requires. The attainment of these results is beyond the power of an Act of Congress. The chief thing that such an Act can do is to remove obstacles which bad laws and worse practices have placed in our way.

The attempt to render direct protection to the shipper by a federal statute regarding stock and bond issue, is attended with difficulties which are almost insuperable.

In the case of *Smyth v. Ames* the Supreme Court of the United States held that the amount of bonds and stocks outstanding was but one among many matters to be considered in deciding whether rates were reasonable. This, therefore, is the law as determined by precedent; and it is fortunate that the dictates of precedent coincide with those of business sense. The attempt to make the face value of securities issued the determining factor in rates, would result in putting a premium on roads which had been speculatively, not to say dishonestly, built or managed, by allowing them to charge higher rates on account of the inflated capital thus produced. And, wholly apart from any such speculation or dishonesty, the amount of stock capital and bonded debt, even if paid for at par, is a very inaccurate and incomplete criterion of the value of the property devoted by its owners to public use. It has at best only a historical importance, as showing what property was or purported to be worth at the time of the incorporation. It does not show what it is worth, or what rates may properly be charged for its use, ten years later or even one year later.

25. Promoters' Profits and Services.

We are told that the profits of the promoter represents a wholly unnecessary burden upon the American public, and that so far as this profit can be done away with it will be good for

all parties. Neither of these statements is quite true. The promoters, using the term in a broad sense, may be divided into two classes: constructors who build a road whose future is uncertain, in the expectation of selling the stock for more than it cost them; and financiers who induce the public to buy the bonds of such roads. Both of these classes, if they do their work honestly, render a useful service to the public. The constructor gives our undeveloped districts the benefit of new roads, which they would not get without his intervention; and if he does his business well, he builds the roads more economically than anybody else could. The financier renders an equally important service in collecting the capital of the investors to build new railroads or improve old ones. On the Continent of Europe this is done by the banks. The great banking concerns of Germany use a very considerable part of their deposits in carrying industrial enterprises during their initial stages before their merits have been demonstrated, then disposing of them to the actual investor at a profit in order to set their capital free for the floating of new concerns. But in the United States the power of the banks to do this is limited by law and by custom; and so far as they either cannot or do not, it must be done by financial houses specially organized for the purpose.

Our American system undoubtedly involves grave possibilities of fraud. The man who is constructing a road is tempted to persuade people to loan him money on inadequate security. The financiers may be tempted to wink at this deception. Worst of all, the roads thus built may be built for sale at an inflated valuation. The promoter may obtain his profit, not from the legitimate increase of the value of his property, but from his power to persuade the management of some larger system to buy the branch-road for more than it is really worth. These are evils which publicity would do much to check. Where there is no fraud, the promoter renders a service for which he is entitled to fair remuneration.

26. Standardization of Railroad Securities.

We are told that if it was possible to standardize food by a pure food law, it ought to be possible to standardize railroad securities by a securities law. It is possible—to the same extent and no more. The pure food law enables a man to know what he is buying. It does not certify that the thing he buys is good for him. That is left to his intelligence. The government cannot protect the investors against the consequences of their unwisdom in buying unprofitable bonds, any more than it can protect the consumers against the consequences of their unwisdom in eating indigestible food. Unless we are prepared to have government guarantees of interest on railroad investments—a most questionable proposal—the only way in which we can

standardize railroad mortgages is the one which we use with savings bank mortgages. We can insist on double security. We can say that at least half the capital of a railroad must be subscribed by stockholders, and not more than half may be raised by borrowing—a difficult requirement under existing conditions. Until we are prepared to pass some law of this kind the investor must depend upon his own intelligence to protect him from loss. The function of the government is to see that correct information is available.

27. Restoration of Public Confidence.

There was a time when the efforts of the banking authorities in most of the states were directed toward getting the discount rates as low as possible. The bank commissioners in those days regarded themselves as the representatives of the merchants who wanted loans; they made little or no attempt to safeguard the stockholders and creditors of the bank. Those were the days of wildcat banking. The country has passed beyond that period—not solely or primarily because it obtained a National Banking Law, but because it administered that law with due regard to the security of the stockholders and creditors of the bank as well as its customers. We have not developed our ideas of railroad management as far as we have developed our ideas of bank management. The subject is a more complex one. The apparent conflict of interests between the management and the customers is greater with a railroad than with a bank. As a result of this misunderstanding, the necessary development of railroad facilities is now endangered by the reluctance of investors to purchase new issues of railroad securities in the amounts required. This reluctance is likely to continue until the American public understands the essential community of interest between shipper and investor, and the folly of attempting to protect the one by taking away the rewards of good management from the other.

We are told that a good law regarding national incorporation would of itself create public confidence. This is an over-statement. Such a law would remove one set of sources of distrust, but there is another set, more fundamental, which can only be removed by the exercise of intelligence on the part of the American people as a whole.

28. Amount of Additional Capital Required.

There is a widespread belief, based on imperfect examination of the evidence, that the amount of capital needed for the future development of our railroad system is small in proportion to that which has been required in the past; that the profits on such added investments of capital are reasonably well assured; and that we can therefore fix attention predominantly if not exclu-

sively on the needs of the shipper without interfering with the necessary supply of new money from the investors. It is quite possible that the building of additional railroad mileage will be far less rapid in the future than it has been in the past. But the capital needed for the development and the improvement of the mileage already existing is enormous, even if we built no new mileage at all. The outstanding stock and debt of the railways in the United States averages less than \$60,000 a mile of line. This figure is bound to be greatly increased in the immediate future. As our population grows denser, we shall need more and more to approximate European standards of construction by the increased amount of double track, the abolition of grade crossings, the development of station facilities, both for passengers and for freight, and many other improvements scarcely less fundamental. While our railroads are perhaps even better equipped for the economical handling of large masses of long distance freight, they are far from being adequately provided with appliances to secure the convenience of the public or the safety of passengers and employees. The cost of all these things is very great. The average capitalization per mile of railroads in Germany is \$109,000, in France \$137,000, in Belgium \$177,000, in Great Britain \$265,000; and, contrary to the commonly received opinion much of this excess of cost as compared with American roads is due to other causes than the price of real estate—an item in which our companies have had a great advantage. The cost of European roads has been largely due to improvements which we have not yet made, and many of which we must make in the future as population grows denser. The thousands of millions of dollars needed for these purposes must be raised by the sale of securities.

29. Present Return and Future Security.

Neither the rate of return actually received on the par value of American railroad bonds and stocks today, nor the security which can be offered for additional railroad investments in the future, will make it easy to raise the needed amount of capital.

The ratio of interest and dividends to outstanding bonds and stocks of American railroads is not quite four and a half per cent in each case. The average ratio of dividends to the capital of national banks is between ten and eleven per cent. If it be objected that the value of the stocks of our railroads is in considerable measure due to the growth of the community rather than to the cash originally invested, and that the bonds and stocks of railroads should therefore be compared with the combined capital and surplus of the national banks, we find that the banks have for the last three years maintained an average ratio of dividends to capital and surplus combined of over six and a half per cent. If we look not at the sums divided, but at the sums earned, we find the same difference of profit in favor of the banks.

Nor can the security which most of our railroads offer be regarded as exceptional. The underlying bonds of the older systems are doubtless secure. It is not probable that even a grave commercial crisis will affect the return of a trunk line first mortgage. But very little of the new capital can be raised on securities of this kind. Most of it must come either from bonds which will not be a first lien for many years, or from new issues of capital stock. The investors in these securities, and especially in stocks, take risks which cannot be accurately forecast. Apart from probable fluctuations in traffic and probable increases in cost of operation, new inventions may at any time render much of their present plant antiquated. The substitution of electricity for steam is but a type of the many changes which railroads may be compelled to make, any one of which might involve large additions to their cost without the assurance of corresponding additions to their return.

30. What Constitutes a Reasonable Return.

We hear much about a reasonable return on capital. A reasonable return is one which under honest accounting and responsible management will attract the amount of investors' money needed for the development of our railroad facilities. More than this is an unnecessary public burden. Less than this means a check to railroad construction and to the development of traffic. Where the investment is secure, a reasonable return is a rate which approximates the rate of interest which prevails in other lines of industry. Where the future is uncertain the investor demands, and is justified in demanding, a chance of added profit to compensate for his risk. We cannot secure the immense amount of capital needed unless we make profits and risks commensurate. If rates are going to be reduced whenever dividends exceed current rates of interest, investors will seek other fields where the hazard is less or the opportunity greater. In no event can we expect railroads to be developed merely to pay their owners such a return as they could have obtained by the purchase of investment securities which do not involve the hazards of construction or the risks of operation.

31. Points to be Emphasized.

In concluding its report your Commission desires to emphasize the following points:

1st. The questions presented for its consideration do not include or involve a comparison of the policy of governmental ownership of railroads with the policy of private ownership in any of its forms. The Act of Congress under which the Commission was appointed provides that its duty shall be "to investigate questions pertaining to the issuance of stocks and bonds by railroad corporations, subject to the provisions of the Act to regulate

commerce, and the power of Congress to regulate or affect the same." The Commission has, therefore, concerned itself exclusively with questions which arise under a system of governmental regulation of privately owned railroads.

2nd. It has not seemed to the Commission profitable to consider at length what the government might have done in times past, nor to enter upon a historical recital of incidents arising out of the unregulated issue of securities. Railroad development has gone so far and such a vast volume of securities has already been issued, that the only questions of real importance today are whether, under the conditions which now exist, it is desirable for the federal government to regulate the issue of future securities, and if so, to what extent and in what manner. In other words, the large volume and complex relationships of the outstanding securities, the issue of which has not been regulated at all by the federal government and has not been effectively regulated by the state governments, make it impossible to treat the question of present or future regulation as it might have been treated if these securities were not already in existence.

3rd. It would have been equally unprofitable for the Commission to enter upon an elaborate discussion of the power of Congress to regulate or affect railroad securities, at a time when important cases are pending which will go far to determine the scope and extent of federal authority in this and other closely related subjects. Such a discussion could only state the opinion of the members of the Commission regarding the constitutional power of Congress. The issues themselves will remain undecided until the Supreme Court decides them. Whatever may be the ultimate outcome, the present fact which faces us is that constitutional questions of far-reaching consequence are today unsettled and must remain so for a considerable time. Under these circumstances, any attempt by Congress to adopt the policy of federal regulation to the exclusion of state regulation, would be premature. On the other hand, to superimpose federal regulation upon state regulation would add to conflicts and complexities which, in the public interest, should be diminished rather than increased. Your Commission believes that for the present an earnest effort should be made on the part of state authorities to harmonize existing requirements, both of law and procedure, and that for the future careful consideration should be given by Congress to the preparation of a permissive federal incorporation act for railroads engaged in interstate commerce.

4th. Many, if not most, of the abuses connected with railroad securities arise out of an almost universal failure to recognize the distinctions which exist and should exist between bonds and stocks. A bond is an obligation to pay a fixed sum of money at a stated time. A stock certificate is merely the evidence of ownership of a share in the property, profits, and risks of a corporation.

Most of the evils of which investors and the public complain have grown out of the attempt to give the stock a face value in terms of money. Even if the state laws prohibiting the issue of stocks for less than par were literally enforced all that the recitals on the face of a fully paid share of stock as to its par or money value would signify is that at the time of the issuance of the share there had been paid into the corporation an amount of money (or other valuable consideration) equal to the par value of the share. They do not even purport to indicate that at any time after the original issue of the stock the corporation was possessed either of the money or the money's worth. The real value of the stock certificate depends upon the manner in which the money has been invested. The Commission is, therefore, of the opinion that it is far more important to ascertain just what are the facts connected with the issue of securities and what has actually been done with whatever money has in fact been realized from the stock that is issued, than merely to make sure that the par value of the stock was paid in at the time of issue.

5th. If we were compelled to assume that rates are to be materially influenced either in their making by the railroads or in their regulation by the government by the amount and face value of the stocks and bonds outstanding, it seems to your Commission impossible to escape the conclusion that these securities should be issued only under governmental regulation. Your Commission, however, believes that the amount and face value of outstanding securities has only an indirect effect upon the actual making of rates and that it should have little, if any, weight in their regulation.

In so far as the value of the property is an element in rate regulation the outstanding securities are of so little evidentiary weight that it would probably be of distinct advantage if courts and commissions would disregard them entirely, except as a part of the financial history of the property, and would insist upon direct evidence of the actual money invested and of the present value of the properties. For this and other reasons discussed in the body of the report, your Commission recommends that the Interstate Commerce Commission should have authority and adequate funds to make a valuation of the physical property of railroads wherever the question of the present value of these roads is, in the judgment of that Commission, of sufficient importance. It is hardly necessary to add that your Commission does not believe that the cost of reproduction of the physical properties, however carefully computed, is the sole element to be considered in determining the present value of a railroad, or that the outstanding securities could or should be made, to conform to any such arbitrary standard.

If, however, railroad securities are to be issued only after express authorization of each particular issue by the Interstate

Commerce Commission or other governmental agency, it is difficult to see how the government can thereafter escape the moral, if not the legal, obligation to recognize these securities in the regulation of railroad rates. In view of the vast extent of the railroad systems of this country and the magnitude of the financial interests involved, both on the part of the railroads and of those who pay the rates, your Commission believes that the possible consequences of such a system of regulation are too serious to warrant its adoption at the present time.

6th. Upon the whole, your Commission believes that accurate knowledge of the facts concerning the issue of securities and the expenditure of their proceeds is the matter of most importance. It is the one thing on which the federal government can effectively insist today, it is the fundamental thing which must serve as a basis for whatever additional regulation may be desirable in the future.

ARTHUR T. HADLEY, *Chairman.*
FREDERICK N. JUDSON
FREDERICK STRAUSS
WALTER L. FISHER
BALTHASAR H. MEYER

Suggestions relating to publicity, indicating points upon which amendments to the Act to Regulate Commerce might be based. This Commission has not considered it proper to present a formal draft of a statute.

That every railroad corporation subject to the provisions of the Act shall file with the Interstate Commerce Commission on or prior to the date of issuance of any stocks, bonds, notes or other evidences of indebtedness payable at periods of more than twelve months after the date thereof, and now or hereafter to be authorized, a certificate of notification in such form as the Commission may from time to time determine and prescribe which shall show:

First: (a) The total amount thereof authorized.

(b) The number and amount thereof outstanding prior to the date of such certificate; the amount thereof theretofore retired; the amount thereof then undisposed of, and whether such amount is held in the treasury of the corporation as a free asset, or pledged, and if pledged, the terms and conditions of such pledge.

(c) The number and amount thereof then to be issued and whether to be sold, pledged or held in the treasury of the corporation as a free asset; if such securities are to be sold, the terms of sale, if a contract for such sale has been made, and if any part of the consideration to be received therefor is other than money, an accurate and detailed description thereof; if such securities are to be pledged, the terms and conditions of such pledge.

(d) The number and amount thereof remaining unissued.

(e) If the issue is of shares of stock, the certificate shall also show the par value thereof, or if the issue is of shares of stock that have no specified nominal or par value, the number of such shares, and the number of then outstanding shares previously issued.

Second: The preferences or privileges granted to the holders of any such shares of stock; the dates of maturity, rates of interest of any such bonds, notes or other evidences of indebtedness, and any conversion rights granted to the holders thereof, and the price, if any, at which such shares or bonds may be redeemed.

Whenever any securities set forth and described in any certificate of notification as pledged or held as a free asset in the treasury of the corporation shall subsequent to the filing of such cer-

tificate be sold or repledged or otherwise disposed of by the corporation, such corporation shall file a further certificate of notification to that effect, setting forth therein all such facts as are required by subdivision (c) of the foregoing first paragraph. The provisions in regard to certificates of notification shall apply to notes or evidences of indebtedness running for periods of twelve months or less, and to the pledging or repledging of stocks, bonds or other evidences of indebtedness to secure such notes or evidences of indebtedness running for periods of twelve months or less, except that such certificates may be filed within ten days after the issue thereof instead of on or prior to the date of such issue.

Every such railroad corporation shall furnish to the Commission, at such time or times as the Commission may require, in addition to its income account, a balanced statement of its receipts and expenditures on capital account, and of the surplus of the income account accruing during the period covered by such statement, as well as of all other financial transactions that have taken place during such period, with whom had, whether in cash, in securities, or in other valuable consideration.

The Commission may also require the carrier to furnish any further statements of fact or evidence that it may deem necessary or appropriate.

The certificates of notification, and any other written statement furnished to the Commission under the Act, shall be signed and verified by the auditor, comptroller, or other acting fiscal head of the carrier.

It shall be the duty of the Commission to enforce these provisions, and to make public by appropriate means the information received, as, in its discretion, it may deem proper; and such certificates of notification shall at all times be deemed public records and open to inspection.

The Commission may also require the carrier to compile for the information of its shareholders such facts in regard to the financial transactions of the carrier for its fiscal year in such form as the Commission may direct. The carrier may be required by order of the Commission to disclose every interest of the directors of such carrier in any transaction under investigation. The Commission shall have the power to investigate all such transactions and to inquire into the good faith thereof, to examine the books and papers of carriers, construction or other companies or of firms or individuals with which the carrier shall have had financial transactions, for the purpose of enabling it to verify any statements furnished, and to examine into the actual cost and value of property acquired by, or services rendered to, such carrier.

Appropriate penalties, including fine and imprisonment, should be provided for violation of the Act.

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